Most of the water used for agricultural and urban purposes falls as rain and snow far from where it is used, in the mountains of the Sierra Nevada. To bring water to large urban centers of the San Francisco Bay Area and Los Angeles, and to productive agricultural regions in the Central Valley, the state built an extensive network of water conveyances. This includes the Central Valley Project, a 400-mile network of dams, reservoirs, canals, and hydroelectric powerplants in northern and central California.[12] The centerpiece of the Central Valley Project is Shasta Dam on the Sacramento River, which was completed in 1945, and holds back the largest above-ground reservoir in the state.[13] The California State Water Project operates partly in conjunction with the Central Valley Project, and provides drinking water for 27 million people and irrigation water for 750,000 acres of farmland.[14]

Starting in the 1920s, after surface water sources had been claimed, farmers and municipalities turned to groundwater to irrigate their crops and supply their industrial and domestic needs. The advent of more powerful electric pumps aided this extraction, and eventually the rate of extraction reached double the rate of natural recharge.[15] Today, over 6 million Californians rely solely or primarily on groundwater, especially

[12] U.S. Bureau of Reclamation, *Central Valley Project* (Jan. 3, 2023), https://www.usbr.gov/mp/cvp/.
[13] U.S. Bureau of Reclamation, *Projects & Facilities: Shasta Dam*, https://www.usbr.gov/projects/index.php?id=241.
[14] Cal. Dep't of Water Res., *State Water Project*, https://water.ca.gov/programs/state-water-project; Coachella Valley Water District, *California's State Water Project*, https://www.cvwd.org/170/Californias-State-Water-Project.
[15] Janny Choy & Geoff McGhee, *Groundwater: Ignore It, and It Might Go Away*, WATER IN THE WEST (Dec. 19, 2014), https://waterinthewest.stanford.edu/groundwater/overview/.

in the Central Valley and Central Coast regions.[16] In total, 85% of the state's population uses groundwater to some degree.[17] In normal years, groundwater accounts for around 29% of total water use. That number increases to 39% in dry years, and 60% or higher in drought years.[18] Using groundwater when surface water supplies fail prevents collapse of the state's massive agricultural industry. However, when groundwater use is not properly regulated, it can lead to problems.

The most direct impact of excessive groundwater pumping is the drop in the water table. Relatively unchecked groundwater pumping caused the groundwater table to drop by tens to over a hundred feet between 1995 and 2015 alone, causing shallower wells to run dry. [19] This poses equity issues because rural landowners and small-scale farmers have fewer resources to install new wells, or deepen existing ones.[20]

Beyond the drop in the water table itself, when water is pumped out of the ground, the sediment that once was surrounded by water may collapse or condense, leading to a drop in surface elevation and often permanent loss of groundwater storage capacity.[21] Such subsidence can continue for decades or centuries even if groundwater

---

[16] Janny Choy & Geoff McGhee, *Groundwater: Ignore It, and It Might Go Away*, WATER IN THE WEST (Dec. 19, 2014), https://waterinthewest.stanford.edu/groundwater/overview/.
[17] *Id.*
[18] *Id.*
[19] Zeno F. Levy et al., *Critical Aquifer Overdraft Accelerates Degradation of Groundwater Quality in California's Central Valley During Drought*, 48 GEOPHYS. RESCH. LETTERS (2021), https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1029/2021GL094398.
[20] Tara Moran, Jenny Choy, and Carolina Sanchez, *The Hidden Costs of Groundwater Overdraft*, WATER IN THE WEST (Sept. 9, 2014), https://waterinthewest.stanford.edu/groundwater/overdraft/index.html.
[21] Michelle Sneed et al., *Land Subsidence along the Delta-Mendota Canal in the Norther Part of the San Joaquin Valley, California, 2003-10* at 2, 8 (2013), https://pubs.usgs.gov/sir/2013/5142/pdf/sir2013-5142.pdf.

depletions level off.[22] Instead, to halt subsidence, groundwater levels must actually go up.[23] The area underlying the resurgent Tulare Lake referenced above is one area experiencing such subsidence.[24]

Subsidence is a problem largely because it damages infrastructure. In the Central Valley, this includes aqueducts, roads, bridges, buildings, and wells.[25] Aqueducts may become less effective at conveying water over long distances because they rely on an even gradient over long distances. When part of the land that the aqueduct passes over subsides, that gradient is disturbed, and a choke point may arise, reducing flow in the aqueduct.[26] This is part of the reason that floodwaters in Tulare Lake cannot easily be pumped elsewhere.[27] Subsidence also raises the risk that water will spill over the sides of an aqueduct, causing erosion or even emergency shutdowns.[28] The cost to repair the damage from subsidence that occurred between 1955 and 1972 alone is estimated to be $1.7 billion.[29]

---

[22] Matthew Lees et al., *Development and Application of a 1D Compaction Model to Understand 65 Years of Subsidence in the San Joaquin Valley*, WATER RESOURCES RESEARCH (2022), https://doi.org/10.1029/2021WR031390.
[23] *Id.*
[24] U.S. Geol. Survey, *Areas of Land Subsidence in California*, https://ca.water.usgs.gov/land_subsidence/california-subsidence-areas.html.
[25] *Id.* at 9.
[26] Cal. Dept. of Water Resources, *California Aqueduct Subsidence Program*, https://water.ca.gov/Programs/Engineering-And-Construction/Subsidence.
[27] Evan Bush, *A Long-Dormant Lake Has Reappeared in California, Bringing Havoc Along With It*, CNBC (Apr. 4, 2023), https://www.cnbc.com/2023/04/04/a-long-dormant-lake-has-reappeared-in-california-bringing-havoc-along-with-it.html.
[28] *Id.*
[29] *See* [29] Janny Choy, Geoff McGhee & Melissa Rohde, *Recharge: Groundwater's Second Act* (Dec. 19, 2014), https://waterinthewest.stanford.edu/groundwater/recharge/ (estimate adjusted to 2023 dollars).

On the western side of the Central Valley, further from the Sierra Nevada Mountains, farmers historically relied almost entirely on groundwater for irrigation. Accordingly, they experienced the worst declines in water table and land surface.[30] In some areas, land subsidence between 1926 and 1970 exceeded 27 feet.[31] An additional three feet of subsidence occurred during the extreme drought of 2013-2016, during which water users relied heavily on groundwater withdrawals.[32]

Overdrafting of aquifers can also cause problems with water quality. In the Central Valley, both domestic and municipal wells are at risk. Municipal wells reach deeper levels of the aquifer, and thus are less likely to run dry.[33] However, as pumping increases during drought, and groundwater levels drop, vertical seepage of agricultural contamination such as nitrate, fumigants, salt, and uranium increases.[34] This has caused contamination to reach the levels that municipal wells draw from.[35]

The Central Valley Project and the State Water Project described above were also intended to avoid further subsidence.[36] While these projects provided temporary relief,

---

[30] Devin Galloway & Francis S. Riley, San Joaquin Valley, California: Largest Human Alteration of the Earth's Surface *in* U.S. Geological Survey, Land Subsidence in the United States (Devin Galloway et al., eds., 1999).
[31] Michelle Sneed et al., *Land Subsidence along the Delta-Mendota Canal in the Norther Part of the San Joaquin Valley, California, 2003-10* at 1 (2013), https://pubs.usgs.gov/sir/2013/5142/pdf/sir2013-5142.pdf.
[32] Cal. Dept. of Water Resources, California Aqueduct Subsidence Program, https://water.ca.gov/Programs/Engineering-And-Construction/Subsidence.
[33] Z.F. Levy et al., *Critical Aquifer Overdraft Accelerates Degradation of Groundwater Quality in California's Central Valley During Drought*, 48 GEOPHYS. RSCH. LETTERS (2021), https://www.researchgate.net/publication/354304317_Critical_Aquifer_Overdraft_Accelerates_Degradation_of_Groundwater_Quality_in_California%27s_Central_Valley_During_Drought.
[34] *Id.*
[35] *Id.*
[36] Janny Choy, Geoff McGhee & Melissa Rohde, *Recharge: Groundwater's Second Act* (Dec. 19, 2014), https://waterinthewest.stanford.edu/groundwater/recharge/.

they ultimately could not keep pace with the increased water use in the region, and overdraft renewed once more.[37]

The most recent acceleration in overdraft provided the impetus to pass the Sustainable Groundwater Management Act of 2014, discussed in more detail below. Because the Act requires that groundwater withdrawals come into balance with recharge, the state acknowledges that the irrigated acreage of the state will decrease by 500,000 to 1,000,000 acres by 2040.[38]

III. How Climate Change Will Affect California's Water Supply

The California Department of Water Resources estimates that California's water supply will decrease by 10% by 2040 due to climate change.[39] The projected decrease is equivalent to the capacity of the two largest reservoirs in the state.[40] But that does not mean there will not be wet winters in California in the future. Precipitation is not projected to decrease significantly going forward, and may actually increase.[41] In fact, there is an expected large increase in extreme wet-event frequency going forward, while low- to medium-intensity precipitation events may decrease.[42] And these predictions

---

[37] *Id.*
[38] CALIFORNIA DEPARTMENT OF WATER RESOURCES, CALIFORNIA'S WATER SUPPLY STRATEGY: ADAPTING TO A HOTTER, DRIER FUTURE 1 (Aug. 2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf.
[39] *Id.*
[40] CALIFORNIA DEPARTMENT OF WATER RESOURCES, CALIFORNIA'S WATER SUPPLY STRATEGY: ADAPTING TO A HOTTER, DRIER FUTURE 2 (Aug. 2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf.
[41] Cayan et al., *Climate Change Scenarios for the California Region*, 87 CLIMATE CHANGE S21, S28 (2008), https://link.springer.com/article/10.1007/s10584-007-9377-6.
[42] Daniel Swain et al., *Increasing Precipitation Volatility in Twenty-First-Century California*, 8 NATURE CLIMATE CHANGE 427 (2018), https://www.nature.com/articles/s41558-018-0140-y; Suraj D. Polade et al., *Precipitation in a Warming World: Assessing Projected Hydro-Climate Changes in California and other Mediterranean Climate Regions*,

track on-the-ground experience in the state: In the last 10 years, California has experienced both record drought and record precipitation.[43]

Instead, the loss of water supply will result from increased temperatures causing increased evaporation rates and decreased runoff, along with depleted snowpack.[44] Normally, California's snowpack releasees around 15 million AF of water in the spring and summer, providing a vital source of water that lasts beyond the winter's precipitation.[45] However, temperatures in California have risen from half a degree Fahrenheit in the north, to three degrees in the south over the past century.[46] As a result of continued temperature increases, some models indicate that late-winter snow accumulation will decrease by 50% by 2100.[47] Other studies indicate up to 79% loss in snowpack by the end of the century. Snowpack will also accumulate at higher elevations than it used to, and melt earlier in the spring.[48]

---

[43] *See* California Natural Resources Agency, *Report to the Legislature on the 2012-2016 Drought* (2021), https://drought.unl.edu/archive/assessments/CNRA-Drought-Report-final-March-2021.pdf (noting that 2012-2015 was the driest four-year period on record, accompanied by record-high temperatures, while 2016-2017 featured record-wet conditions).
[44] CALIFORNIA DEPARTMENT OF WATER RESOURCES, CALIFORNIA'S WATER SUPPLY STRATEGY: ADAPTING TO A HOTTER, DRIER FUTURE 1 (Aug. 2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf.
[45] Office of the California Attorney General, *Climate Change Impacts in California*, https://oag.ca.gov/environment/impact.
[46] ENV'T PROT. AGENCY, WHAT CLIMATE CHANGE MEANS FOR CALIFORNIA (2016), https://www.epa.gov/sites/default/files/2016-09/documents/climate-change-ca.pdf.
[47] Norman L. Miller et al., *Potential Impacts of Climate Change on California Hydrology*, 39 J. AM. WATER RES. ASS'N 771 (2007), https://onlinelibrary.wiley.com/doi/10.1111/j.1752-1688.2003.tb04404.x.
[48] *Id.*

Future dry years will also increasingly coincide with elevated temperature anomalies, a combination that will negatively impact snowpack on multiple fronts.[49] Together, these effects will leave less water for later in California's dry summers, and also threaten to overwhelm water storage facilities with snowmelt in the spring. When wet and snowy winters do happen, as in the winter of 2022-2023, the ensuing spring and early summer will still be warmer on average than in the past. This combination of factors has the potential to strain or overwhelm water storage capacity, and exacerbate extensive flooding in areas like Tulare Lake.

IV. Where Should California Store Its Water Going Forward?

The combination of these effects counsels in favor of storing water in the wet years for use in the dry years, as has been done for over a century in California's Mediterranean climate. But with longer droughts punctuated by very wet years, the need to increase storage is more pressing than ever.

Traditionally, water has been stored in above-ground reservoirs, such as Shasta Lake and Lake Oroville. And there is significant political willpower behind building new above-ground storage facilities, or expanding existing ones. Governor Newsom's 2022 water resilience plan calls for creating or expanding surface water storage, and he has expressed support for the new $4.4 billion, 1.5 million AF Sites Reservoir project, which is currently undergoing environmental review.[50] Meanwhile, the U.S. Bureau of

[49] Noah S. Diffenbaugh, Daniel L. Swain & Danielle Touma, *Anthropogenic Warming has Increased Drought Risk in California*, 112 PNAS 3931 (2015), https://www.pnas.org/doi/epdf/10.1073/pnas.1422385112.
[50] Alastair Bland, *This Reservoir on the Sacramento River Has Been Planned for Decades. What's Taking So Long?*, CAL MATTERS (Feb. 27, 2023), https://calmatters.org/environment/2023/02/california-sites-reservoir/.

Reclamation is evaluating the possibility of enlarging Shasta Reservoir by 634,000 AF.[51] It has touted the possible benefits of increased water supply, improved reliability, reduced flood damage, and improved Sacramento River temperatures and water quality below the dam.[52]

Below-ground storage has also emerged as an attractive option, and offers a number of advantages over traditional methods of water storage. Accordingly, Governor Newsom's resilience plan calls for expanding average annual groundwater recharge by "at least" 500,000 AF. Meanwhile, the State Water Resources Control Board recognizes that "[i]ntentional, directed recharge of groundwater is one of the fastest, most economical, and widely available ways to harness the bounty of wet years to cope with dry years."[53]

The first advantage to groundwater recharge is that it is less expensive than its alternatives. The cost of storing an acre-foot of water under ground is estimated at $90-1100, with a median of $390.[54] These figures are significantly lower than estimates for both reservoir expansion ($1700-2700) and seawater desalination ($1900-3000+).[55]

Second, groundwater storage capacity already exists. In California, there are 850 million to 1.3 billion AF of capacity.[56] These figures dwarf the existing above-ground

---

[51] U.S. Bureau of Reclamation, *Shasta Dam and Reservoir Enlargement Project*, (Mar. 24, 2022), https://www.usbr.gov/mp/ncao/shasta-enlargement.html.
[52] *Id.*
[53] CAL. DEP'T OF NATURAL RES., CALIFORNIA'S WATER SUPPLY STRATEGY: ADAPTING TO A HOTTER, DRIER FUTURE (2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf.
[54] Janny Choy, Geoff McGhee & Melissa Rohde, *Recharge: Groundwater's Second Act*, WATER IN THE WEST (Dec. 19, 2014), https://waterinthewest.stanford.edu/groundwater/recharge/.
[55] *Id.*
[56] https://waterinthewest.stanford.edu/groundwater/recharge/

capacity of around 136 million AF.[57] Accordingly, construction costs required to store water underground are lower. And because the water is stored underground, evaporative losses are mitigated.

Below ground storage could also yield important benefits for presently overdrawn waterways and ecosystems. Because groundwater and surface water flows are hydrologically connected, restoring groundwater levels can restore instream flows, which are vital for healthy ecosystems.[58] Inadequate instream flows prevent migratory fish from reaching their spawning habitats, exacerbating the direct impediment of dams themselves. Waterways with reduced flows also run warmer than native fish are accustomed to, because the water equilibrates with the surrounding air more easily, and less cold groundwater enters laterally when groundwater has been depleted. Elevated water temperature causes problems for fish embryos, which require more oxygen in warmer waters, but whose ability to take in more is limited by the diffusion rate across the egg surface.[59] It also raises the risk of disease transmission for adult fish.[60] For depleted coastal aquifers, storing water underground can also prevent saltwater intrusion.

---

[57] Cal. Dep't of Water Res., *Reservoir Information Sorted by Dam Name* (April 1, 2023), https://cdec.water.ca.gov/reportapp/javareports?name=ResInfo.
[58] U.S. Geol. Survey, *Interconnected Surface-Water Depletion*, https://ca.water.usgs.gov/sustainable-groundwater-management/interconnected-surface-water-depletion.html.
[59] Benjamin Martin et al., *The Biophysical Basis of Thermal Tolerance in Fish Eggs,* 287 PROC. ROYAL SOC'Y B: BIOLOGICAL SCI. 1 (2020), https://doi.org/10.1098/rspb.2020.1550.
[60] Env't Prot. Agency, *EPA Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards* 7 (2003), https://nepis.epa.gov/Exe/ZyPDF.cgi/P1004IUI.PDF?Dockey=P1004IUI.PDF.

Underground storage also prevents water from warming in the reservoirs themselves before it is released downstream. When reservoirs are full, they stratify into layers, with colder water at the bottom and warmer water at the top.[61] Dams are designed to tap into the colder water at the bottom to maintain cold enough water temperatures for fish downstream. However, when reservoirs are depleted during droughts, they lose that cold water storage, and the remaining water is heated more than it would otherwise would be due to the increased surface area to volume ratio.[62]

Reduced flows also adversely affect the mix of salt and fresh water in areas like the Sacramento-San Joaquin Delta. The low salinity, or "X2" zone of mixing coincides with the location of prolific primary productivity in the Delta, but reduced inflows shift that location inland, thus reducing the food supply for fish.[63]

Together, these impacts have contributed to dramatic reductions in fish populations in California, with many species on the verge of extinction.[64] Six native species are now listed as threatened or endangered under the state and federal Endangered Species Acts. One of them is the fall-run Chinook salmon, which experienced an 85% reduction in population from 1985 to 2017.[65]

---

[61] [61] *See* Yifan Cheng et. al., *Reservoirs Modify River Thermal Regime Sensitivity to Climate Change: A Case Study in the Southeastern United States*, 56 Water Res. Rsch. 1 (2020).
[62] *See* Yifan Cheng et. al., *Reservoirs Modify River Thermal Regime Sensitivity to Climate Change: A Case Study in the Southeastern United States*, 56 WATER RES. RSCH. 1 (2020).
[63] The Bay Institute, *San Francisco Bay: The Freshwater-Starved Estuary 8 (Sept. 2016), https://cawaterlibrary.net/wp-content/uploads/2016/09/Freshwater_Report.pdf.*
[64] Cal. State Water Res. Control Bd., *Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitat, and Interior Delta Flows* 1-5 (2017), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/PCFFA&IGFR/part2/pcffa_168.pdf.
[65] Cal. State Water Res. Control Bd., *Water Quality Control Plan for the San Francisco*

Finally, underground storage avoids the need to flood more above-ground land, which is often occupied by disadvantaged parties like native tribes. For example, when Shasta Dam was completed in 1945, it flooded 90% of the Winnemem Wintu Tribe's historical village sites, sacred sites, burial sites, and cultural gathering sites. And proposals to raise the dam level threaten those that remain.[66]

V. Legal Background

To understand the groundwater recharge possibilities requires investigating how it fits into California's unique water rights system.

Surface water in California is governed by both riparian and appropriative water rights regimes. Riparian water rights adhere to the smallest parcel of land adjacent to the water body in question, and that water may be used on that parcel alone.[67] Appropriative water rights arise out of using water on non-riparian lands. Such appropriations that began prior to 1914 support water rights that do not generally require a permit.

For surface water uses that began after 1914, non-riparian water users must get approval from the State Water Board, and obtain a water right permit.[68] Once the water use project is completed, the State Water Board determines how much of the water was

Bay/Sacramento-San Joaquin Delta Estuary 1 (2018), https://www.waterboards.ca.gov/plans_policies/docs/2018wqcp.pdf.

[66] Caleen Sisk, *Raising Shasta Dam Threatens McCloud River, Sacred Tribal Lands and Salmon* (Apr. 15, 2021), https://calmatters.org/commentary/my-turn/2021/04/raising-shasta-dam-threatens-mccloud-river-sacred-tribal-lands-and-salmon/.

[67] Cal. State Water Res. Control Bd., *Water Rights: Frequently Asked Questions*, https://www.waterboards.ca.gov/waterrights/board_info/faqs.html#:~:text=Water%20is%20protected%20for%20the,use%20reasonable%20amounts%20of%20water.

[68] *Id.*

beneficially used, and proceeds to issue a water right license.[69] That license represents a vested water right in line with the actual use of water, as opposed to the amount allowed under the permit.[70]

To capture and store surface water, a party usually must hold an appropriative right to that water. However, where the water to be captured for recharge is not claimed by another water right holder, such as in extremely wet years where all water rights are satisfied, a party does not require a water right, but merely needs a temporary permit.[71] Regardless, the diversion of water for recharge must not harm the existing rights of those upstream and downstream of the project.[72]

Groundwater use in California is governed by the reasonable use doctrine. Under this framework, to have a right to groundwater, a party must extract the water and put it toward a beneficial use.[73] In theory, the beneficial use requirement assures that the water will not be wasted. In practice, almost anything counts as a beneficial use, but groundwater recharge in and of itself does not. Thus, when a party seeks to acquire water for groundwater recharge, it must specify what the eventual beneficial use will be.[74] However, the beneficial use could involve leaving the water in the ground to, for

---

[69] *Id.*
[70] *Id.*
[71] Cal. State Water Res. Control Bd., *Permits for Groundwater Recharge* (Mar. 7, 2023), https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/groundwater_recharge/.
[72] CAL. DEP'T OF NATURAL RES., CALIFORNIA'S WATER SUPPLY STRATEGY: ADAPTING TO A HOTTER, DRIER FUTURE (2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf.
[73] *Id.*
[74] CAL. STATE WATER RES. CONTROL BD., FACT SHEET: PURPOSES OF USE FOR UNDERGROUND STORAGE PROJECTS (2020),

example, counteract seawater intrusion into an aquifer.[75]An increase in aquifer levels can also constitute a beneficial use if it maintains the supply of shallow domestic wells, reduces the rate of future land subsidence, or avoids depletion of interconnected surface waters.[76] Such use on the directly overlying land gets priority over uses elsewhere.[77]

Since 2014, groundwater has also been governed by the Sustainable Groundwater Management Act (SGMA). Under SGMA, the California Department of Water Resources must "conduct an investigation of the state's groundwater basins."[78] The goal of such investigation is to prioritize the state's 515 groundwater basins based on the following eight criteria:

1. The population overlying the basin or subbasin.
2. The rate of current and projected growth of the population overlying the basin or subbasin.
3. The number of public supply wells that draw from the basin or subbasin.
4. The total number of wells that draw from the basin or subbasin.
5. The irrigated acreage overlying the basin or subbasin.
6. The degree to which persons overlying the basin or subbasin rely on groundwater as their primary source of water.
7. Any documented impacts on the groundwater within the basin or subbasin, including overdraft, subsidence, saline intrusion, and other water quality degradation.
8. Any other information determined to be relevant by the department, including adverse impacts on local habitat and local streamflows.[79]

Basins that are considered medium or high priority must establish groundwater sustainability agencies (GSAs), and implement groundwater sustainability plans

---

https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/docs/purposes_of_use_fact_sheet_final.pdf.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] CAL. WATER CODE § 12924(a) (West 2023).

[79] CAL. WATER CODE § 10933 (West 2023).

(GSPs). GSPs must be designed to avoid six enumerated "undesirable results" and to mitigate overdraft of groundwater within 20 years.[80] Undesirable results include chronic lowering of groundwater levels, reduction of groundwater storage, seawater intrusion, degraded water quality, land subsidence, and depletions of interconnected surface water.[81]

The most recent basin prioritization was completed in 2019, and identified 94 basins or subbasins as medium or high priority.[82] These basins are where 98% of the state's groundwater pumping takes place, and 21 of them are considered critically overdrafted (Figure 2).[83] The number of critically overdrafted groundwater basins nearly doubled between 1980 and 2019.[84] Tulare Lake is included in the most recent list of high-priority, critically-overdrafted basins.[85] The Tulare Lake basin also suffers from high groundwater salinity, especially because it does not have a natural outflow, thus allowing salts to accumulate as water evaporates from the area.[86]

---

[80] Cal. Dep't of Water Res., *Sustainable Groundwater Management Act (SGMA)*, https://water.ca.gov/programs/groundwater-management/sgma-groundwater-management; *Basin Prioritization*, CAL. DEPT. OF WATER RES., https://water.ca.gov/Programs/Groundwater-Management/Basin-Prioritization.

[81] CAL. STATE WATER RES. CONTROL BD., FACT SHEET: PURPOSES OF USE FOR UNDERGROUND STORAGE PROJECTS (2020), https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/docs/purposes_of_use_fact_sheet_final.pdf.

[82] *Basin Prioritization*, CAL. DEPT. OF WATER RES., https://water.ca.gov/Programs/Groundwater-Management/Basin-Prioritization.

[83] *Id.*

[84] Janny Choy & Geoff McGhee, *Groundwater: Ignore It, and It Might Go Away*, WATER IN THE WEST (Dec. 19, 2014), https://waterinthewest.stanford.edu/groundwater/overview/index.html.

[85] Cal. Dept. of Water Res., *SGMA Basin Prioritization Dashboard*, https://gis.water.ca.gov/app/bp-dashboard/final/.

[86] *Id.*

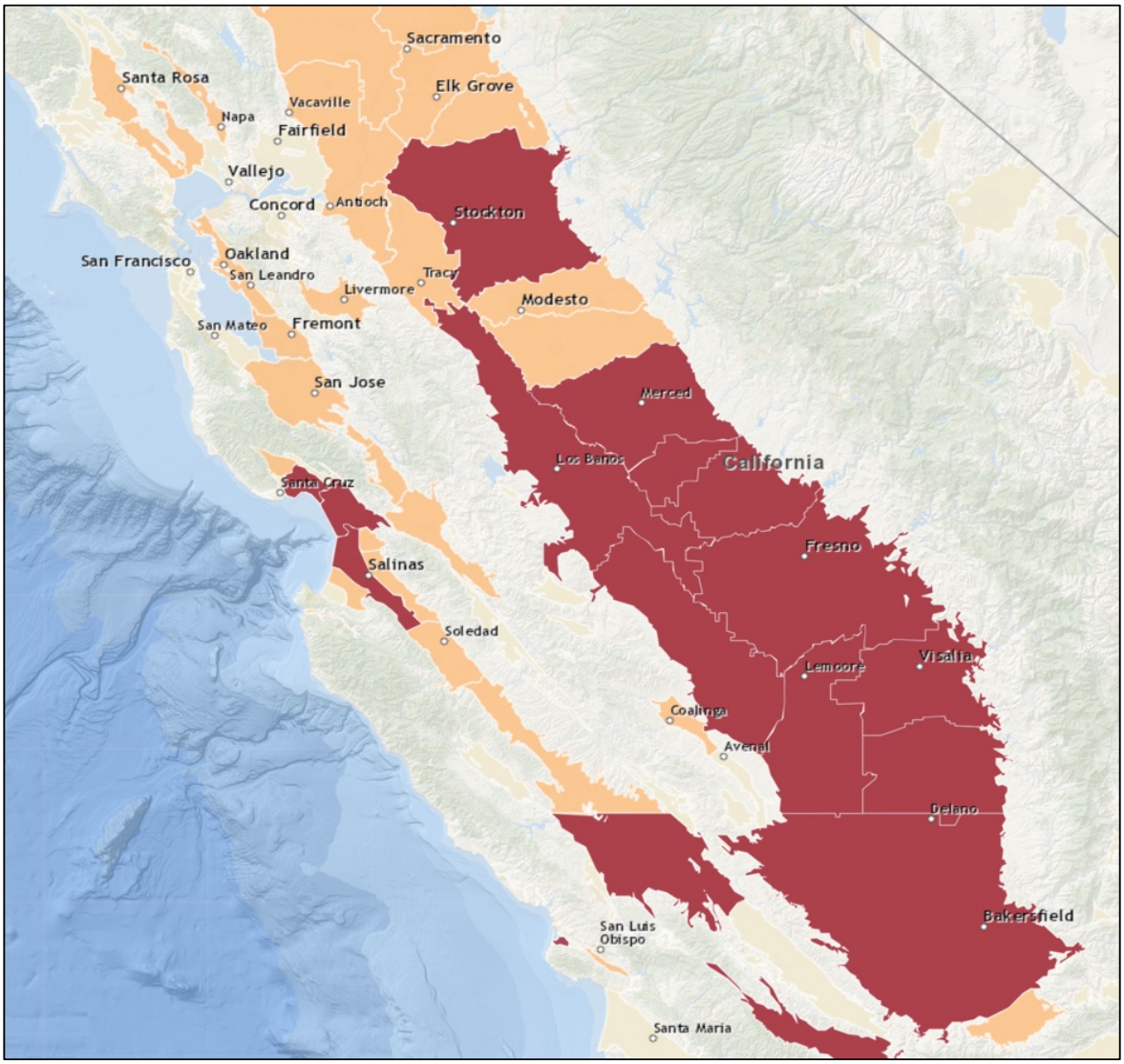

Figure 2. The vast majority of the Central Valley is classified as Medium or High Priority (orange), and most of the southern half of the valley is critically overdrafted (red).[87]

[87] Cal. Dept. of Water Res., *SGMA Basin Prioritization Dashboard*, https://gis.water.ca.gov/app/bp-dashboard/final/.

VI. Existing Groundwater Recharge Efforts

California has set a goal of expanding average annual groundwater recharge by at least 500,000 acre-feet.[88] And it has taken some important concrete steps toward that goal. By the end of 2023, the state will have invested $350 million toward local recharge projects.[89] And on January 6 of this year, the State Water Board approved a six-month permit to allow diversion of excess flow from Mariposa Creek to recharge groundwater. The Board did so under a new pilot program that began in August 2022 to fast track proposals. As part of the program, the Department of Water Resources implemented a number of changes to make groundwater recharge permits easier to obtain. These include simplifying the water availability analysis, jointly completing permits along with the applicant, covering permit fees and costs, and suspending provisions of the California Environmental Quality Act (CEQA).[90] The state claimed that it would "develop a mechanism to create a more consistent, economical, and equitable approach for allocation of water rights for groundwater recharge" by "securing reasonably

[88] *Id.*at 6.
[89] CALIFORNIA DEPARTMENT OF WATER RESOURCES, CALIFORNIA'S WATER SUPPLY STRATEGY: ADAPTING TO A HOTTER, DRIER FUTURE 7-8 (Aug. 2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf.
[90] Cal. Dep't of Water Res., *DWR Regulatory Assistance: Temporary Water Rights for Groundwater Recharge* (2022), https://water.ca.gov/-/media/DWR-Website/Web-Pages/Water-Basics/Drought/Files/Groundwater/Expediting-Water-Rights-FactsheetFINAL2-20220919.pdf; Cal. State Water Res. Control Bd., *Permits for Groundwater Recharge*, https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/groundwater_recharge/.

available future flood flows" and allocating the water "in an orderly, holistic, equitable, and integrated approach."[91]

Covering permit application costs is a good first step; permit applications start at $1,000, and increase from there based on the amount of water that a user wants to divert.[92] Users must also pay an $850 fee to the Department of Fish and Wildlife.[93] But the largest fee associated with water permits is preparing CEQA documents, which can cost upwards of $30,000.[94] Those documents must then be reviewed for another $1,800-$2,500.[95] Finally, the permittee must pay $100 or more to maintain the permit each year.[96]

All told, the State has approved 26 temporary applications for groundwater recharge since 2015.[97] They range in amounts authorized from 2,444 AF to 72,000 AF, and are almost exclusively focused on the Central Valley.[98]

However, there are still limits on when groundwater recharge permits are available, and when they actually result in recharge. Applicants must be GSAs or local public agencies, and the GSA or local public agency must support monitoring and

---

[91] CALIFORNIA DEPARTMENT OF WATER RESOURCES, CALIFORNIA'S WATER SUPPLY STRATEGY: ADAPTING TO A HOTTER, DRIER FUTURE 7-8 (Aug. 2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf.
[92] Cal. State Water Res. Control Bd., *Water Rights: Frequently Asked Questions*, https://www.waterboards.ca.gov/waterrights/board_info/faqs.html#:~:text=Water%20is%20protected%20for%20the,use%20reasonable%20amounts%20of%20water.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Cal. State Water Res. Control Bd., *Pending Temporary Permits for Underground Storage, Including Those Consistent With Governor Executive Orders* (Mar. 23, 2023), https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/groundwater_recharge/pending_applications.html.
[98] *Id.*

reporting on any recharge events.[99] Moreover, nearly all of the 26 approved permits resulted in minimal or no actual diversion after temporary permits were granted.[100] For temporary permits whose diversion period is complete, only 44,380 AF were diverted out of the over one million AF that were authorized.[101] While some of these permits were granted during drought years of 2020-2022 when water for recharge would have been limited, other permits were granted during wet years of 2016-2017 and 2018-2019.[102] This suggests that even when permits are available, they were not always the limiting factor in how much groundwater is actually recharged.

This discrepancy between permits and actual recharge also calls into question the state's assumption that 500,000 AF of recharge is a "reasonable estimate" of the additional annual recharge that will follow from its funded recharge projects that have not even achieved permitting yet.[103] And the Tulare Lake debacle belies the "orderly" process that the state envisioned for its groundwater recharge program.[104]

---

[99] Cal. Dep't of Water Res., *DWR Regulatory Assistance: Temporary Water Rights for Groundwater Recharge* (2022), https://water.ca.gov/-/media/DWR-Website/Web-Pages/Water-Basics/Drought/Files/Groundwater/Expediting-Water-Rights-FactsheetFINAL2-20220919.pdf.
[100] Cal. State Water Res. Control Bd., *Pending Temporary Permits for Underground Storage, Including Those Consistent With Governor Executive Orders* (Mar. 23, 2023), https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/groundwater_recharge/pending_applications.html.
[101] *Id.*
[102] *Id.*
[103] *See* CALIFORNIA DEPARTMENT OF WATER RESOURCES, CALIFORNIA'S WATER SUPPLY STRATEGY: ADAPTING TO A HOTTER, DRIER FUTURE 6 (Aug. 2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf.
[104] *See id.* at 7-8.

VII. How to Incentivize More Groundwater Recharge

Despite taking important steps toward alleviating problems associated with overuse of groundwater, California is failing to realize the full potential of the preexisting reservoirs beneath its feet. It has been nearly a decade since SGMA passed, requiring certain groundwater basins to come into equilibrium between recharge and extraction. But today, as the state enjoys an extremely wet winter that provided reprieve from the severe drought of the prior three years, it is not taking full advantage of the available water. Land owners are fighting to keep water *out* of their fields, rather than for the right to allow that water to inundate their lands and eventually recharge their aquifers. And the state has only approved a handful of temporary groundwater recharge permits this year. This state of things suggests that the incentives for landowners to pursue recharge projects are not aligned with the value that these projects would provide for those landowners and the state more broadly. To remedy this disconnect, the state must think more creatively about how to change the status quo.

Here, I posit that water markets can bridge the gap between the groundwater recharge that the state permits and the amount that is actually diverted by increasing the incentives for landowners to follow through with recharge projects. Under this model, landowners with suitable land for groundwater recharge, such as fallowed farmland, would get credit for demonstrated recharge. These parties would be able to sell the water that they recharged to others in future years.

Water markets are not new to California, which began promoting their use in the 1970s.[105] In response to one of the driest years on record, Governor Brown and the state legislature commissioned reports that concluded water marketing should be a crucial component of the state's future water plans.[106] The most basic appeal of water markets is that they allow water to be reallocated to its most valuable use. Without water markets, farmers are incentivized to use all of the water they are allocated by law; as discussed above, it is a "use it or lose it" regime. If someone opts to put water in the ground rather than using it, they could be deemed to have abandoned or forfeited the right to that water in the future.[107]

The incentive to use the entirety of one's water allocation leads to inefficient practices. For example, in 2013 following a dry winter, farmers in Southern California used over 100 billion gallons of water from the Colorado River to irrigate notoriously thirsty alfalfa crops, while the rest of the state languished under water shortages.[108] If that water were traded elsewhere, it could have been applied to more valuable crops and provided higher returns for the sellers themselves.

---

[105] *See* Ellen Hanak, Who Should Be Allowed to Sell Water in California? Third-Party Issues and the Water Market (2003), https://www.ppic.org/wp-content/uploads/content/pubs/report/R_703EHR.pdf.
[106] *Id.* at 3.
[107] *See* PETER W. CULP, ROBERT GLENNON & GARY LIBECAP, SHOPPING FOR WATER: HOW THE MARKET CAN MITIGATE WATER SHORTAGES IN THE AMERICAN WEST (2014), https://www.hamiltonproject.org/assets/files/how_the_market_can_mitigate_water_shortage_in_west.pdf.
[108] PETER W. CULP, ROBERT GLENNON & GARY LIBECAP, SHOPPING FOR WATER: HOW THE MARKET CAN MITIGATE WATER SHORTAGES IN THE AMERICAN WEST (2014), https://www.hamiltonproject.org/assets/files/how_the_market_can_mitigate_water_shortage_in_west.pdf.

The incentive to use one's maximum allotment is especially true for groundwater, which flows freely underground, and does not adhere to above-ground properly delineations. During periods of water shortage, allowing transfers allows what little water we have to be allocated to its highest use, or to avoid the most costly consequences.

Overall, despite the state's efforts, annual trades account for only around 3% of the water used in California, much of which is purchased by the state itself for water banking and environmental purposes.[109]

As part of the proposal presented here, the state could also take steps to ensure that the subsequent withdrawals do not exceed the amount that was actually recharged. It could do so by imposing a buffer whereby the amount available for withdrawal is actually less than the estimated amount recharged under this system. This buffer would serve to raise the water table, and thereby counteract subsidence that otherwise would continue beyond the period of water table drawdown. To fund monitoring, the state could take a cut of the proceeds that accrue from sales. This would alleviate the burden on monitoring that is currently placed on the GSAs or local public agencies.

Expanding the use of water markets in the groundwater recharge context would help incentives to pursue recharge align with the value those services provide. Giving water credits to those who actually recharge groundwater directly allows them to more fully capture the benefits of that activity. In the current setup, these parties are incentivized to pursue recharge for more indirect reasons. GSAs are interested in

[109] *Id.*

bringing groundwater basins into equilibrium between withdrawals and inputs, but they still need to find parties who are willing to host the groundwater recharge projects. Meanwhile, individuals are incentivized by the prospect of having more water to use in dry summer months, or drought years ahead. However, due to the nature of groundwater, that water will spread out in the aquifer once it percolates down to the water table. Accordingly, the benefits that accrue to a given recharger are more diffuse, and benefit all users who have access to that aquifer.

This situation is the converse of the tragedy of the commons that led to California's overdraft troubles: When groundwater users capture all of the benefits of pumping, but do not internalize all of the costs of depleting the aquifer below them, they will be incentivized to pump as much as they can. By turning these incentives on their head, water markets have the potential to create incentive structures that result in long-term groundwater recharge.

Providing credits that align with the water that a user has actually recharged would also assuage concerns from others that water sales would negatively affect their interests, because those sales would be surplus water that the recharger brought in.[110] It would also avoid "pecuniary externalities"—those effects on the local economy such as lost tax revenues that result when farmers fallow land to sell their water instead—because the lost agricultural revenue would be at least partly replaced by water revenues.[111] To the contrary, it would give agency to farmers to make their own

[110] *See* Ellen Hanak, *Who Should Be Allowed to Sell Water in California? Third-Party Issues and the Water Market* at vi (2003), https://www.ppic.org/wp-content/uploads/content/pubs/report/R_703EHR.pdf.
[111] *See Id.* at vi.

economic decisions of whether to pursue groundwater recharge projects would allow them to more nimbly respond to changes in crop values. And divorcing sales of water added through intentional recharge projects, as compared to sales of undifferentiated aliquots of water, could relax export restrictions that in the past have quashed incentives to sell water to distant users and thus suppressed market activity.[112]

Moreover, allowing sales of recharged groundwater would help direct recharge water to areas that are most suited for it. Those whose land is most conducive to recharge would be able to store more water in less time than others. This would make recharge a more valuable use of their land than it otherwise would be. Turning again to the Tulare Lake example illustrates the importance of this effect. One might think that the extended period of flooding would at least have enormous benefits for the groundwater issues in that area. However, the region is actually rated as having "very poor" potential for recharge (Figure 3). If individual landowners with favorable geologic conditions were able to resell water based on how much they actually recharged, it would help direct floodwaters there because the comparative value of flooding their land is greater. This is especially important where groundwater recharge potential varies within a given groundwater basin. In such situations, the difference between the value provided and the benefits realized by the recharger is amplified.

This proposed arrangement is not without potential drawbacks. Skeptics of water markets have pointed out that water is not like other goods that can be easily tracked and counted. Water is relatively unique, in that it is part of an open system that

[112] *See Id.* at viii.

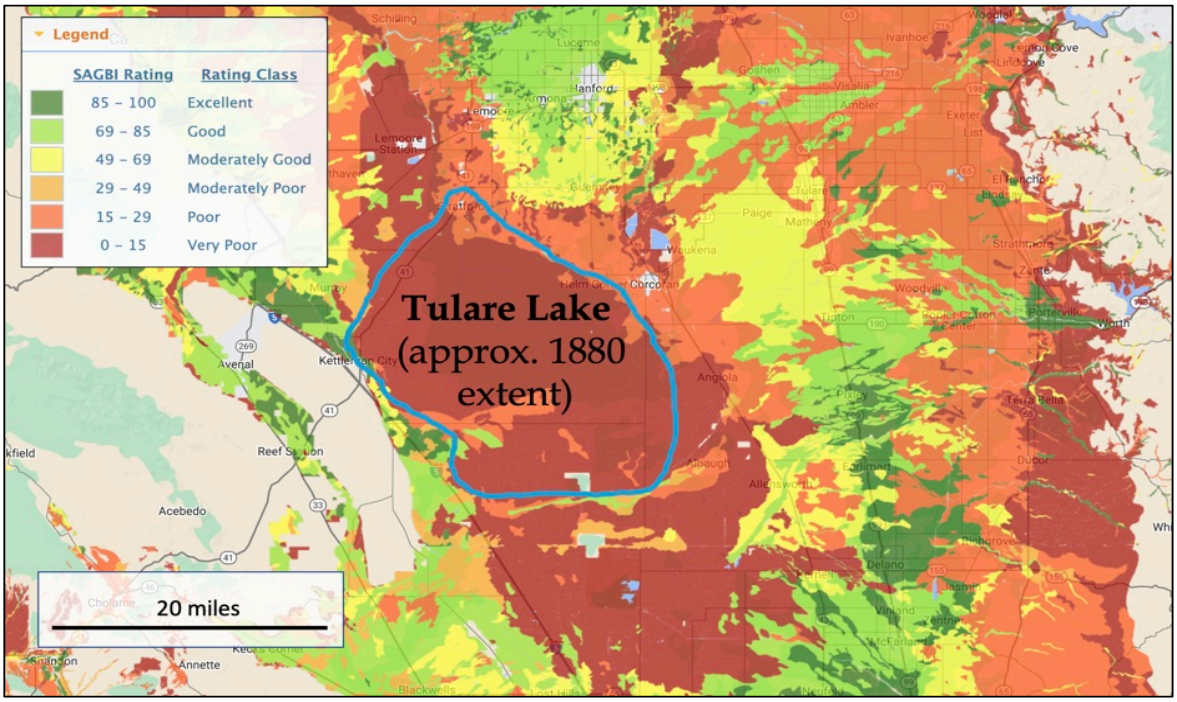

Figure 3. Land suitability for groundwater recharge in the Southern Central Valley varies significantly. The Tulare Lake region is considered "very poor" for that purpose.[113]

flows above and below ground, and evaporates and condenses into and from the air. As such, any transfers of water will be imperfect estimations of what was actually put back into the ground.[114] It is also difficult or impossible to internalize externalities.[115]

Communities often raise concerns about the effects that exports could have on local groundwater users and the local economy.[116] If farmers fallowed their land, and instead sold the water that they otherwise would have used on that land, it would

[113] U.C. Davis, *SAGBI: Soil Agricultural Groundwater Banking Index*, https://casoilresource.lawr.ucdavis.edu/sagbi/#:~:text=The%20SAGBI%20is%20based%20on,limitations%2C%20and%20soil%20surface%20condition.
[114] Eric T. Freyfogle, *Water Rights and the Commonwealth* (1995), https://scholar.law.colorado.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1021&context=sustainable-use-of-west-water.
[115] *Id.*
[116] *Id.* at v.

reduce demand for labor and other farm inputs, and cut off supplies for local processors of those agricultural outputs.[117] If wealthier urban areas are able to pay more for water than local ones, farmers may eventually rely on selling water rather than growing food. Those voicing this concern might point to the collapse of agriculture in Owens Valley that resulted from water sales to Los Angeles.[118] This concern rings especially true for "source" regions, where qualitative studies have reported a "tradition of vigilance" against downstream exports.[119]

Communities in the Central Valley are also wary of water markets, especially for their potential to shift water from the wetter northern part of the valley to the drier southern part.[120] There is evidence of a distrust of public-sector water management that mirrors larger debates over the role of the government and the private sector in solving environmental challenges.[121]

The notion of commoditizing water like other goods also does not accurately account for ecological, spiritual, aesthetic values inherent in water. For example, providing water for groundwater recharge could actually divert water that is important to leave in waterways for ecological purposes. One of the infamous California water sagas referenced above—the export of water from the eastern Sierra Nevada to Los

---

[117] *Id.* at 4-5.
[118] *See* Inyo County Water Dep't, *Owens Valley Water History (Chronology)*, (Jan. 2008), https://www.inyowater.org/documents/reports/owens-valley-water-history-chronology/.
[119]
[120] *Id.*
[121] *See Id.* at 50; Karen Bakker, *The Business of Water: Market Environmentalism in the Water Sector*, 39 ANN. REV. ENVIRON. RES. 469 (2014), https://www.annualreviews.org/doi/pdf/10.1146/annurev-environ-070312-132730.

Angeles—leaves many uneasy with the prospect of shipping water to far off locales for profit.[122]

It is true that the amount of water diverted for recharge would have to be carefully monitored to ensure that the waters that are actually diverted are truly excessive for ecological health. However, expanding water markets in this context would likely protect ecological and other values by directly supporting interconnected ground-surface water ecosystems. It would also increase water supply in existing water markets and thereby drive down the price that environmental or government groups would have to pay to use water for ecological purposes.

VIII. Conclusion

Just months after California passed the landmark Sustainable Groundwater Management Act, Governor Jerry Brown spoke at Stanford University on the topic of water policy. He described the state's complicated water policy landscape as a "major issue" that "doesn't get solved in one office or one place" and that "engages partisan and ideological fervor."[123] What is clear, however, is that the tools of the past will not serve to maximize this precious resource as California's climate changes to one of increased variability in precipitation, and decreased storage in the mountains' snowpack. Instead, the state must innovate to keep pace with the changing climate based on the best available science. And that science strongly suggests that it should

[122] *See* Ellen Hanak, Who Should Be Allowed to Sell Water in California? Third-Party Issues and the Water Market (2003), https://www.ppic.org/wp-content/uploads/content/pubs/report/R_703EHR.pdf.
[123] Jerry Brown, *New Directions for U.S. Water Policy: Featured Remarks from Governor Jerry Brown*, THE HAMILTON PROJECT (2014), https://www.hamiltonproject.org/events/new_directions_for_u.s._water_policy.

aggressively prioritize storing water in its massive below-ground basins, which offer proven benefits for human and environmental interests alike. The state has begun to recognize this reality and has implemented steps to incentivize groundwater recharge projects, but those incentives still fail to align with the benefits that the projects would provide. By empowering land owners to directly sell water that they have recharged on their land, the state can close that gap, and create a stable incentive regime that helps maximize California's water going forward.

Applicant Details

First Name	**Jacob**
Middle Initial	**M.**
Last Name	**Seidman**
Citizenship Status	**U. S. Citizen**
Email Address	**jakeseid@stanford.edu**
Address	**Address** Street **895 CAMPUS DR, APT 232A** City **Stanford** State/Territory **California** Zip **94305** Country **United States**
Contact Phone Number	**6179995568**

Applicant Education

BA/BS From	**Columbia University**
Date of BA/BS	**May 2017**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 12, 2022**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Journal of Civil Rights & Civil Liberties** **Stanford Law & Policy Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Anderson, Michelle
manderson@law.stanford.edu
_650_ 723-0312
Weisberg, Robert
weisberg@law.stanford.edu
Fisher, Jeffrey
jlfisher@law.stanford.edu
(650) 724-7081
Letter, Dean's
deansletter@law.stanford.edu
650-723-4455

References

Jonathan Miller
Chief Program Officer, Public Rights Project
490 43rd Street, Unit #115
Oakland, CA 94609
Phone: (646) 831-6113
Email: jon@publicrightsproject.org

Josh Rosenthal
Legal Director, Public Rights Project
490 43rd Street, Unit #115
Oakland, CA 94609
Phone: (330) 607-0730
Email: josh@publicrightsproject.org

Marissa Roy
Legal Team Lead, Local Solutions Support Center
Phone: (626) 755-4435
Email: marissa@supportdemocracy.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JACOB MILES SEIDMAN
(617) 999-5568 • 3166 26 St., Unit 3, San Francisco, CA 94110 • jakeseid77@gmail.com

June 23, 2023

The Honorable P. Casey Pitts
United States District Court for the Northern District of California
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am a graduate of Stanford Law School and a current Legal Fellow at Public Rights Project, an Oakland-based nonprofit that focuses on affirmative litigation. Following the conclusion of my fellowship in July, I will be clerking for Magistrate Judge Sallie Kim in San Francisco from the beginning of August until the end of September. I am writing to apply for a term clerkship in your chambers beginning in September 2023.

I am dedicated to a career in public interest litigation focused on the rights of workers, consumers, and marginalized communities. I currently work at Public Rights Project, a nonprofit focused on advancing and protecting progressive local government initiatives in the areas of worker's rights, reproductive rights, voting rights, and criminal justice reform. In that role, I have built on the litigation skills I acquired in Stanford's Supreme Court Litigation Clinic to support PRP's work on behalf of local governments and local elected officials around the country. During my fellowship, I have written amicus briefs on complex issues of federal and state constitutional law in cases before the United States and California Supreme Courts. I have also taken a lead role in developing and litigating the legal theories that Public Rights Project is using to challenge abusive state preemption of reform prosecutors.

I would be honored to learn from your invaluable perspective as a public interest litigator behind the bench by clerking in your chambers. The chance to serve as your clerk while learning from your experiences and building up my own trial litigation experience would be an unparalleled opportunity for me to take my career in public interest litigation to the next level.

Enclosed please find my resume, references, law school transcript, undergraduate transcript, and two writing samples for your review. Professor Michelle Wilde Anderson, Professor Robert Weisberg, and Professor Jeff Fisher are providing letters of recommendation in support of my application under separate cover.

Thank you for your consideration.

Sincerely,

Jacob Seidman

JACOB MILES SEIDMAN

(617) 999-5568 • 3166 26th St., Unit 3, San Francisco, CA 94110 • jakeseid77@gmail.com

EDUCATION

Stanford Law School Stanford, CA

J.D., May 2022

Bar Admissions: State of California, December 2022

Honors: Gerald Gunther Prizes for Outstanding Performance in Torts, State Constitutional Law, and Criminal Procedure; High Pro Bono Distinction (over 200 hours completed)

Journals: *Stanford Journal of Civil Rights & Civil Liberties* (Vol. 17: Special Issue Editor; Vol. 16: Member Editor); *Stanford Law & Policy Review* (Vol. 33: Lead Online Editor; Vol. 32: Online Editor)

Activities: SLS Public Interest Mentor; Stanford Law Association (Section Representative)

Publications: *Safety Beyond Policing: Promoting Care Over Criminalization* (April 2021)

Columbia University New York, NY

B.A., *magna cum laude*, in Political Science & Russian Language and Culture, May 2017

Honors: Junior election to Phi Beta Kappa; Dean's List (all semesters); Caroline Phelps Stokes Prize (Political Science Department prize for best paper on "the rights of man"); National Slavic Honor Society; Pi Sigma Alpha

EXPERIENCE

Public Rights Project, Oakland, CA *Legal Fellow*, Sept. 2022–Present

- Lead research and drafting of amicus briefs in *Moore v. Harper*, a case before the United States Supreme Court, and *Association of Deputy District Attorneys for Los Angeles County v. Gascon*, a case before the California Supreme Court.
- Research and draft motions and complaints for trial litigation challenging abusive restrictions on prosecutors' discretion.
- Prepare memos analyzing legal issues and bills to advise and inform local government clients, localities, and advocacy groups, with a particular focus on combating efforts to restrict prosecutorial discretion and local criminal legal reforms.

Three Strikes Project, Stanford Law School Sept. 2021–Mar. 2022

- Under attorney supervision, took point on all aspects of representation of life-sentenced Project client. Met client in prison, conducted all factual and legal research, and wrote habeas petition for filing in state trial court.

California Dep't of Justice, Civil Rights Enforcement Section, Oakland, CA *Summer Intern*, June–Aug. 2021

- Conducted review of litigation and media materials for state investigation into the Los Angeles Sheriff's Department.
- Conducted legal and policy research and subpoena review in support of state's collaborative reforms to the Vallejo Police Department. Attended weekly meetings with high-level VPD officials.

Supreme Court Litigation Clinic, Stanford Law School *Clinical Student*, Apr.–June 2021

- Worked on student team that researched, wrote, and filed successful brief in opposition to Solicitor General's cert petition in Fourth Amendment criminal case, *U.S. v. Cano*.
- Worked on student team that researched, wrote, and filed cert petition in Federal Tort Claims Act case, *Willis v. U.S.*
- Workshopped other student teams' outlines and draft briefs with classmates, instructors, and co-counsel.

Santa Clara County Litigation & Policy Partnership, Stanford Law School *Policy Lab Student*, Jan.–Mar. 2021

- Researched and drafted litigation memo in support of County consumer protection lawsuit.

San Francisco District Attorney's Office *Fair and Just Prosecution Summer Fellow*, June–Sept. 2020

- In Conviction Review Unit, reviewed files of incarcerated people for resentencing under California PC § 1170(d). Drafted internal resentencing documents and memoranda. Investigated police misconduct and wrongful conviction cases.
- Developed policy project to measure reentry successes and improve resentencing process for DA and other institutional stakeholders, including parole officers. Trained staff in data collection and analysis to support continuity of research.

Prisoner Legal Services Pro Bono Project, Stanford Law School *Co-Leader and Volunteer*, Oct. 2019–May 2022

- Visited San Francisco County Jail weekly with 15 law students to provide people in detention with legal information.
- As co-leader from 2020-2021, managed group's budget, selected new members, organized shifts, and developed remote work format in coordination with Prisoner Legal Services staff attorneys and student volunteers.

Office of the Deputy Mayor for Operations, New York, NY *NYC Urban Fellow*, Sept. 2018–Aug. 2019

- Supported team developing multibillion-dollar plan to shutter city's jails and replace with smaller facilities by preparing agency principals for land use hearings, editing environmental review documents, and tracking agency commitments.
- Worked with team leading multimillion-dollar interagency initiative to improve quality of life in underserved areas by planning site visits and creating slide decks and budget documents. Wrote policy proposal to enhance public safety and mental health by remediating vacant lots.

JACOB MILES SEIDMAN

(617) 999-5568 • 3166 26th St., Unit 3, San Francisco, CA 94110 • jakeseid77@gmail.com

RECOMMENDERS

Professor Michelle Wilde Anderson
Stanford Law School
(650) 723-0312
manderson@law.stanford.edu

Professor Robert Weisberg
Stanford Law School
(650) 723-0612
weisberg@stanford.edu

Professor Jeffrey Fisher
Stanford Law School
(650) 724-7081
jlfisher@stanford.edu

REFERENCES

Jonathan Miller
Chief Program Officer, Public Rights Project
490 43rd Street, Unit #115
Oakland, CA 94609
Phone: (646) 831-6113
Relationship: Mr. Miller is the Chief Program Officer at Public Rights Project and oversees the legal team.

Josh Rosenthal
Legal Director, Public Rights Project
490 43rd Street, Unit #115
Oakland, CA 94609
Phone: (330) 607-0730
Relationship: Mr. Rosenthal is the Legal Director at Public Rights Project and oversees my work for the legal team.

Marissa Roy
Legal Team Lead, Local Solutions Support Center
Phone: (626) 755-4435
Relationship: Ms. Roy leads the Local Solutions Support Center's collaboration with PRP on issues of state preemption, and works closely with me on our work combating state preemption of local criminal justice reforms.

STANFORD UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
STANFORD, CA 94305-6032

Name: Seidman,Jacob Miles
Student ID: 06400918

Johanna Metzgar
Registrar

Print Date: 09/28/2022

-------- Stanford Degrees Awarded --------

Degree : Doctor of Jurisprudence
Confer Date : 06/12/2022
Plan : Law

-------- Academic Program --------

Program : Law JD
09/23/2019 : Law (JD)
Completed Program

-------- Beginning of Academic Record --------

2019-2020 Autumn

Course		Title	Attempted	Earned	Grade
LAW	201	CIVIL PROCEDURE I Diego Zambrano	5.00	5.00	H
LAW	205	CONTRACTS Barbara Fried	5.00	5.00	H
LAW	219	LEGAL RESEARCH AND WRITING Yanbai Andrea Wang	2.00	2.00	H
LAW	223	TORTS	5.00	5.00	H
Transcript Note:		Gerald Gunther Prize for Outstanding Performance John Donohue			
LAW	240M	DISCUSSION (1L): THE CENTRAL PARK FIVE CASE David Mills	1.00	1.00	MP

2019-2020 Winter

Some winter LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

Course		Title	Attempted	Earned	Grade
LAW	203	CONSTITUTIONAL LAW Pamela Karlan	3.00	3.00	MPH
LAW	207	CRIMINAL LAW Lawrence Marshall	4.00	4.00	MPH
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK Julia Mendoza	2.00	2.00	MPH
LAW	2020	HISTORY OF CRIMINAL JUSTICE Lawrence Friedman	2.00	2.00	MPH

2019-2020 Spring

All spring LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

Course		Title	Attempted	Earned	Grade
LAW	217	PROPERTY Michelle Anderson	4.00	4.00	MPH
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE Julia Mendoza	2.00	2.00	MPH
LAW	2026	AMERICAN CRIMINAL JUSTICE AND ITS DISCONTENTS John Donohue; Michael Romano; Robert Weisberg	3.00	3.00	MPH
LAW	2402	EVIDENCE David Sklansky	4.00	4.00	MPH

2020-2021 Autumn

Course		Title	Attempted	Earned	Grade
EDUC	157	ELECTION 2020 James Steyer; Pamela Karlan	1.00	1.00	S
LAW	807X	POLICY PRACTICUM: SELECTIVE DE-POLICING: OPERATIONALIZING CONCRETE REFORMS David Sklansky; Debbie Mukamal; Ralph Banks Robert Weisberg	3.00	3.00	H
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION Robert Weisberg	4.00	4.00	H
LAW	2403	FEDERAL COURTS Charles Tyler	4.00	4.00	P

2020-2021 Winter

Course		Title	Attempted	Earned	Grade
LAW	807G	POLICY PRACTICUM: THE SANTA CLARA COUNTY LITIGATION & POLICY PARTNERSHIP (SCCLPP) Michelle Anderson	3.00	3.00	P
LAW	1028	TAX POLICY Joseph Bankman	2.00	2.00	MP
LAW	4001	MEDIA, TECHNOLOGY, AND THE FIRST AMENDMENT Barbara van Schewick	3.00	3.00	H
LAW	7016	CRITICAL RACE THEORY Richard Ford	3.00	3.00	H
LAW	7051	LOCAL GOVERNMENT LAW Michelle Anderson	3.00	3.00	H

Send To: Jacob Seidman
USA

STANFORD UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
STANFORD, CA 94305-6032

Name: Seidman,Jacob Miles
Student ID: 06400918

Johanna Metzgar
Registrar

2020-2021 Spring

Course		Title	Attempted	Earned	Grade
LAW	920A	SUPREME COURT LITIGATION CLINIC: CLINICAL PRACTICE Edward DuMont; Jeffrey Fisher; Kendall Turner Yaira Dubin	4.00	4.00	P
LAW	920B	SUPREME COURT LITIGATION CLINIC: CLINICAL METHODS Edward DuMont; Jeffrey Fisher; Kendall Turner Yaira Dubin	4.00	4.00	H
LAW	920C	SUPREME COURT LITIGATION CLINIC: CLINICAL COURSEWORK Edward DuMont; Jeffrey Fisher; Kendall Turner Yaira Dubin	4.00	4.00	H

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade
LAW	2008	THREE STRIKES PROJECT: CRIMINAL JUSTICE REFORM & INDIVIDUAL REPRESENTATION Michael Romano	3.00	3.00	P
LAW	7108	STATE CONSTITUTIONAL LAW	3.00	3.00	H
Transcript Note:		Gerald Gunther Prize for Outstanding Performance Jane Schacter			
LAW	7828	TRIAL ADVOCACY WORKSHOP Sallie Kim; Sara Peters; Timothy Hallahan	5.00	5.00	MP

2021-2022 Winter

Course		Title	Attempted	Earned	Grade
LAW	3001	HEALTH LAW: FINANCE AND INSURANCE Daniel Kessler; Laurence Baker	3.00	3.00	H
LAW	6004	LEGAL ETHICS: THE PLAINTIFFS' LAWYER Nora Engstrom	3.00	3.00	H
LAW	7001	ADMINISTRATIVE LAW David Freeman Engstrom	4.00	4.00	P

2021-2022 Spring

Course		Title	Attempted	Earned	Grade
LAW	1029	TAXATION I Jacob Goldin	4.00	4.00	P
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	4.00	H
Transcript Note:		Gerald Gunther Prize for Outstanding Performance Robert Weisberg			
LAW	7010B	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT Jane Schacter	3.00	3.00	H

END OF TRANSCRIPT

Send To: Jacob Seidman
USA

Office of the University Registrar
Stanford University
Stanford, California 94305-6032

Grade point average and rank in class are not computed and are not available. Four grading systems are used at Stanford University. The general University grading system is used in all courses except those taught in the School of Law, the Graduate School of Business, or to M.D. students in the School of Medicine.

Unit of Credit: Every unit for which credit is given is understood to represent approximately three hours of actual work per week for the average student. Thus, in lecture or discussion work, for 1 unit of credit, one hour per week may be allotted to the lecture or discussion and two hours for preparation or subsequent reading and study. Where the time is wholly occupied with studio, field, or laboratory work, or in the classroom work of conversation classes, three full hours per week through one quarter are expected of the student for each unit of credit; but, where such work is supplemented by systematic outside reading or experiment under the direction of the instructor, a reduction may be made in the actual studio, field, laboratory, or classroom time as seems just to the department.

Academic programs include a status effective the day the transcript was printed. Stanford University uses the following program statuses:

Active: Student is currently active in the program indicated.

Leave of Absence: Student is currently on an official leave of absence from active study.

Completed: Student program requirements have been met and the degree has been awarded (degree programs only).

Discontinued: Student no longer enrolled in program (includes post-doctoral scholars whose appointments have ended).

Dismissed: Student was dismissed from the University.

Cancelled: Student deceased while enrolled and program cancelled or student administratively withdrawn for cause.

CHRONOLOGY OF GENERAL UNIVERSITY GRADING SYSTEM

Current (effective Summer Quarter 2008-09):

A (+,-)	Excellent
B (+,-)	Good
C (+,-)	Satisfactory
D (+,-)	Minimal Pass
NP	Not Passed
CR	Credit (student-elected satisfactory: A, B, or C equivalent)
S	No-option Satisfactory (A, B, or C equivalent)
NC	No Credit (unsatisfactory performance, D+ or below equivalent)
I	Incomplete
L	Pass, letter grade to be reported
N	Continuing Course
RP	Repeated Course
GNR	Grade Not Reported
W	Withdrew

Note: The notation * was changed to GNR (Grade Not Reported).

Spring Quarter 2019-20: All undergraduate and graduate courses graded Satisfactory/No Credit (S/NC).

Effective Autumn Quarter 1995-96:

A (+,-)	Excellent
B (+,-)	Good
C (+,-)	Satisfactory
D (+,-)	Minimal Pass
NP	Not Passed
CR	Credit (student-elected satisfactory: A, B, or C equivalent)
S	No-option Satisfactory (A, B, or C equivalent)
NC	No Credit (unsatisfactory performance, D+ or below equivalent)
I	Incomplete
L	Pass, letter grade to be reported
N	Continuing Course
RP	Repeated Course
*	No Grade Reported
W	Withdrew

Autumn Quarter 1994-95: RP was introduced to replace the original grade for a course later retaken. The grade of I (incomplete) was changed to automatically lapse to NP or NC after one year.

Effective Autumn Quarter 1989-90:

A (+,-)	Exceptional Performance
B (+,-)	Superior Performance
C (+,-)	Satisfactory Performance
D (+,-)	Minimal Pass
L	Pass, letter grade to be reported
+	Satisfactory, student elected (A, B, or C)
S	Satisfactory, no option (A, B, or C)
N	Continuing Courses
*	No Grade Reported
I	Incomplete

Note: The P notation has been changed to S (Satisfactory). The lowest acceptable grade for either S or '+' is now C-.

Effective Autumn Quarter 1975-76:

A (+,-)	Exceptional Performance
B (+,-)	Superior Performance
C (+,-)	Satisfactory Performance
D (+,-)	Minimal Pass
L	Pass, letter grade to be reported
+	Pass, student elected (A, B, C, or D)
P	Pass, no option (A, B, C, or D)
N	Continuing Courses
*	No Grade Reported
I	Incomplete

Note: Under this system, Stanford restored the D grade, defining it as 'Minimal Pass.' Pass notations ('+' and P) were redefined to encompass all passing grades, A through D.

Summer Quarter 1972-73: P was introduced to denote pass in a course offered only pass/no credit at the option of the instructor.

Spring Quarter 1971-72: '+' and '-' as grade modifiers were reintroduced for all students.

Autumn Quarter 1971-72: '+' and '-' as grade modifiers were reintroduced for graduate students.

Effective Autumn Quarter 1970-71:

A	Exceptional Performance
B	Superior Performance
C	Satisfactory Performance
L	Pass, letter grade to be reported
+	Pass, student elected (A, B, or C)
N	Continuing Course
*	No Grade Reported
I	Incomplete

Note: The grades A, B, C, and '+' were redefined: D, E, F, W, and '-' were dropped from the grading system. Under the prior system, the University maintained records of all courses a student attempted. But under the revised system, the only courses recorded were those that were successfully completed or for which an I (incomplete) grade was given. The revised system also allowed a student or instructor to request the deletion of an I grade from a student's record if the student did not meet the requirements of the course within the time limit determined by the instructor. The use of the modifying suffixes '+' and '-' appended to letter grades was discontinued.

Effective Autumn Quarter 1963-64:

A	Excellent
B	Good
C	Satisfactory
D	Minimum Credit
E	Conditioned
F	Failed
N	Continuous Course
W	Unauthorized Withdrawal
I	Incomplete
*	No Grade Reported
+	Passed Without Defining Grade
-	Failed Course Taken Pass/Fail

Prior to Autumn Quarter 1963-64:

A	Excellent
B	Good
C	Fair
D	Barely Passed
E	Conditioned
F	Failed
N	Continuous Course
W	Unauthorized Withdrawal
I	Incomplete
*	No Grade Reported
+	Passed Without Defining Grade
-	Failed Course Taken Pass/Fail

CHRONOLOGY OF THE SCHOOL OF LAW GRADING SYSTEM

Effective Autumn Quarter 2009-10, units earned in School of Law are quarter units. Units earned in School of Law prior to 2009-10 are semester units.

Current (effective Autumn 2008-09):

H	Honors (exceptional work, significantly superior to the average performance at the school)
P	Pass (successful mastery of the course material)
R	Restricted Credit (work that is unsatisfactory)
F	Fail (work that does not show minimally adequate mastery of the material)
MP	Mandatory Pass (representing P or better work)
MP-H	Mandatory Pass – Public Health Emergency (effective during the 2020 global pandemic)
N	Continuing Course
I	Incomplete
*	No Grade Reported
GNR	Grade Not Reported (effective Autumn Quarter 2009-10)

Spring Quarter 2019-20: All Law courses graded Mandatory Pass-Health (MPH/F).

Note: Under this grading system, in 2008-09 third-year J.D. students remained under the prior grading system (below).

Effective Autumn 2001-02:

4.3, 4.2	A+
4.1, 4.0, 3.9	A
3.8, 3.7, 3.6, 3.5	A-
3.4, 3.3, 3.2	B+
3.1, 3.0, 2.9	B
2.8, 2.7, 2.6, 2.5	B-
2.2	Restricted Credit
2.1	Failure
I	Incomplete
K	Credit (student elected)
KM	Credit (mandatory)
RK	Restricted Credit
NK	Failure
N	Continuing Course
*	No Grade Reported

Note: The grading system was revised to a number system with letter equivalents and the grades of 2.3 and 2.4 (C+) were eliminated.

Effective Autumn 1983-84:

A+	4.3, 4.2
A	4.1, 4.0, 3.9
A-	3.8, 3.7, 3.6, 3.5
B+	3.4, 3.3, 3.2
B	3.1, 3.0, 2.9
B-	2.8, 2.7, 2.6, 2.5
C+	2.4, 2.3
R	2.2 (restricted credit)
F	2.1 (failure)
N	Continuing Course
I	Incomplete
*	No Grade Reported
K	Credit (student elected)
KM	Credit (mandatory)
RK	Restricted Credit

Note: The C, C-, D+, D and D- grades were eliminated. The grade of R (Restricted Credit) was introduced with the value of 2.2. The RK and F grades were redefined to a value of 2.2 and 2.1 respectively. Students may elect to take a limited number of courses on the K, RK, NK system. K shall be awarded for work that is comparable to numerical grades 4.3 - 2.3, RK for 2.2, an NK for 2.1.

Effective Autumn 1969: A second grading system was introduced with the following values:

K	Credit (1.7 - 4.3)
RK	Restricted Credit (0.9 - 1.6)
NK	No Credit (0 - 0.8)

Prior to Autumn 1969-70:

A+	4.3, 4.2
A	4.1, 4.0, 3.9
A-	3.8, 3.7, 3.6, 3.5
B+	3.4, 3.3, 3.2
B	3.1, 3.0, 2.9
B-	2.8, 2.7, 2.6, 2.5
C+	2.4, 2.3
C	1.9, 2.0, 2.1
C-	1.8, 1.7, 1.6, 1.5
D+	1.4, 1.3, 1.2
D	1.1, 1.0, 0.9
D-	0.8, 0.7, 0.6
F	0.0

Note: This system employs letter grades with numerical equivalents.

THE SCHOOL OF MEDICINE GRADING SYSTEM

The following grades are used in reporting on the performance of students in the M.D. program:

+	Pass. Indicates that the student has demonstrated to the satisfaction of the department or teaching group responsible for the course that s/he mastered the material taught in the course.
-	Fail. Indicates that the student has not demonstrated to the satisfaction of the department or teaching group responsible for the course that he or she has mastered the material taught in the course.
EX	Exempt. Course exempted by examination. No units granted.
N	Continuing Course
I	Incomplete
GNR	Grade Not Reported (effective Autumn Quarter 2009-10)

CHRONOLOGY OF THE GRADUATE SCHOOL OF BUSINESS GRADING SYSTEM

Current (Effective Autumn 2000-01):

H	Honors
HP	High Pass
P	Pass
LP	Low Pass
U	Unsatisfactory
EX	Course Exempted (does not affect grade point calculations)
+	Pass (LP or better)
GNR	Grade Not Reported (effective Autumn Quarter 2009-10)

Effective Autumn Quarter 1971-72:

H	Distinction. Work that is of markedly superior quality.
P+	Work that is of high quality and exceeds in a significant way all of the basic requirements of the course.
P	Pass. Work that is of good quality and clearly satisfies all the basic requirements of the course.
P-	Low Pass. Work that satisfies most of the basic require-ments of the course but is deficient in some minor way.
U	Unsatisfactory. Work that does not satisfy the basic requirements of the course and is deficient in significant ways.
EX	Course Exempted (does not affect grade point calculations)
+	Pass (P- or better)

JACOB MILES SEIDMAN

(617) 999-5568 • 3166 26th St. Unit 3, San Francisco, CA 94110 • jakeseid77@gmail.com

WRITING SAMPLE

The attached writing sample is a litigation memo that I wrote in my current role as a Legal Fellow at Public Rights Project. The memo analyzes the law on claim preclusion in Arizona from the perspective of potential plaintiffs. I researched, wrote, and edited this memo, and it is entirely my work product. I have edited it as necessary to preserve confidentiality. I am submitting this memo with the approval of Public Rights Project's Legal Director.

MEMORANDUM

To: Josh Rosenthal, Legal Director
From: Jake Seidman
Date: December 21, 2022
Re: Res Judicata/Claim Preclusion in Arizona State Courts

Introduction and Summary

The task for this memo was to evaluate Arizona law on preclusion to determine the preclusive implications of state court litigation. This memo presents an initial investigation of state law on claim preclusion and a guide for strategic considerations and further discussions.

The main takeaway from my research is that there is a split of authority in Arizona law regarding what constitutes the same claim for the purposes of claim preclusion. The state supreme court has only ever expressly endorsed a plaintiff-friendly test for claim identity under which a party may evade claim preclusion by pleading different facts in a subsequent case. However, some of Arizona's lower appellate courts have nonetheless applied the modern test, barring subsequent litigation that arises from the same nucleus of facts as a prior proceeding. The modern test has been cited by the state supreme court in other contexts, but never expressly adopted. Deepening the confusion, different federal courts have recognized each test as part of Arizona's law on preclusion. Thus, litigation of this issue could result in resolution of the state law of claim preclusion by the Arizona supreme court.

I. Issue/Claim Preclusion in Arizona Generally

The law of preclusion is designed to prevent relitigation of issues or claims that have already been decided to prevent duplicative and vexatious litigation.[1] Preclusion comes in two varieties.

First, there is issue preclusion (or collateral estoppel), which broadly prohibits the re-litigation of factual or legal issues "that were actually litigated and determined and only if that determination was successful" in a prior proceeding.[2] Second, there is claim preclusion (or res judicata), which

[1] *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 934 P.2d 801, 805 (Ariz. Ct. App. 1993) ("The undesirability of such a succession of litigation, unfair to the defendant and burdensome to the legal system, is obvious.").
[2] *Cigna Health Plan v. Industrial Comm'n*, 811 P.2d 370, 375 (Ariz. Ct. App. 1991). The elements of issue preclusion are: (1) the parties actually litigated the issue in the prior proceeding; (2) the parties had a full and fair opportunity to litigate the issue; (3) the issue's resolution was essential to the decision; (4) the court entered a valid final decision on the merits; and (5) a common identity of parties exists. *Hullett v. Cousin*, 63 P.3d 1029, 1035 (Ariz. 2003). Additionally, concerns of fairness, public interest, or other "special circumstances" may operate to allow litigation of issues otherwise precluded by issue preclusion. *Id.*

operates more broadly to "prevent[] litigation of issues that were actually litigated *as well as ones that could have been litigated*" in a prior proceeding.[3]

Because issue preclusion is somewhat more controllable ex ante, as its applicability relies in part on plaintiffs' choice of which issues to litigate,[4] this memo will focus on the scope of claim preclusion under Arizona law. As a threshold matter, Arizona law is relevant here because the initial proceeding is occurring in Arizona state court. This is a relevant distinction because (as discussed below) when a judgment is rendered in a state court proceeding, the court in the subsequent proceeding (whether state or federal) will apply state law on claim preclusion to determine the preclusive effect of the initial state court judgment.

II. Claim Preclusion Under Arizona Law

In Arizona, claim preclusion applies where there is "(1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between parties in the two suits."[5] Presuming for the moment that future suits challenging particular laws will come after a final judgment on the merits in previous litigation and will be between the same parties, this memo will focus on the first prong of the test to address concerns about the preclusive effect of raising some, but not all, possible challenges to these laws. **The narrow question at issue here is how to define "an identity of claims in the suit for which a judgment is entered" for the purposes of claim preclusion under Arizona law.** If the "claims" are the same, claim preclusion will bar the second proceeding.

Arizona's supreme court understands that "the doctrine of res judicata will preclude a claim when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privities was, *or might have been*, determined in the former action."[6] What "might have been" determined in the former action appears to include "every point *raised by the record* which could have been decided."[7] Similarly, a judgment "is not only Res judicata as to every issue decided, but it is also Res judicata as to any issue raised *by the record*."[8] "The doctrine of res judicata binds the same parties standing in the same capacity in the subsequent litigation on the same cause of action, not only upon those

---

[3] *Cigna Health Plan, supra*, 811 P.2d at 375 (emphasis added).
[4] *See Bayless v. Industrial Comm'n*, 880 P.2d 654, 659 (Ariz. Ct. App. 1993) ("The applicability of preclusion, however, may involve disputed questions of fact: whether a particular issue was litigated or determined by a prior award. . . . Issue preclusion applies if, but only if, an issue was litigated, determined, and that determination was necessary to the decision. [Citation]. The party asserting preclusion has the burden of proving that an issue was in fact litigated and determined and that this determination was necessary.").
[5] *Peterson v. Newton*, 307 P.3d 1020, 1022 (Ariz. Ct. App. 2013) (quoting *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 127 P.3d 882, 887-88 (Ariz. 2006)).
[6] *Hall v. Lalli*, 977 P.2d 776, 779 (Ariz. 1999) (emphasis added).
[7] *Day v. Wiswall's Estate*, 381 P.2d 217, 219 (Ariz. 1963) (emphasis added).
[8] *Fraternal Order of Police, Lodge 2 v. Superior Court*, 596 P.2d 701, 703 (Ariz. 1979) (emphasis added).

facts actually litigated, but also upon those points which might have been (even though not expressly) litigated."[9] These cases suggest that, as a threshold matter, the applicability of claim preclusion seems to be limited where the factual record of the underlying actions differs.[10]

However, Arizona courts have also framed the applicability of claim preclusion more broadly, holding that a decision can be "res judicata as to all *theories* that [Plaintiff] asserted . . . or could have asserted," barring a plaintiff "from bringing another action based on the same claim it has litigated already, notwithstanding that some theories may not have been raised in the trial court" because a "claim" includes "all rights of the plaintiff to remedies against the defendant with respect to any or all part of the *transaction or series of connected transactions*, out of which the action arose."[11]

This apparent conflict seems to reflect a deeper dispute about the proper test under Arizona law for determining whether claims are the same for the purposes of issue preclusion. My research has revealed a split of authority in Arizona regarding which test to use: the "same evidence" test, which is more factbound and plaintiff-friendly, or the "transactional" test, which is more defendant-friendly.

A. The "Same Evidence" Test for Claim Identity

Arizona has historically utilized a plaintiff-friendly "same evidence" test to identify identical claims for the purposes of claim preclusion, which essentially gives the plaintiff the power to avoid preclusion by pleading claims with different facts or under different theories. The test was adopted by the state supreme court in a 1966 decision that has never been overruled. However, while appellate courts continue to apply the "same evidence" test, they have also been applying the modern "transactional" test, despite the fact that the latter has never been expressly adopted by the supreme court.

In 1966, the state supreme court held that "[t]he relevant test" for determining the applicability of claim preclusion under Arizona law "is not whether there has been a prior lawsuit, but whether the same cause of action, or one so closely related that its proof depends on the same facts, has once been litigated."[12] Under this test, "[t]wo causes of action which arise out of the same transaction or occurrence are not the same for purposes of res judicata if proof of different or additional facts will be required to establish them,"[13] effectively enabling plaintiffs "to avoid preclusion merely by posturing the same claim as a new legal theory."[14] While the "same

[9] *Di Oro v. City of Scottsdale*, 408 P.2d 849, 850 (Ariz. Ct. App. 1965).
[10] *See Spur Feeding Co. v. Superior Court*, 505 P.2d 1377, 1379 (Ariz. 1973).
[11] *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R. Co.*, 297 P.3d 923, 926 (Ariz. Ct. App. 2013) (internal quotation marks omitted) (emphasis added).
[12] *Rouselle v. Jewett*, 421 P.2d 529, 532 (Ariz. 1966).
[13] *E.C. Garcia & Co., Inc. v. Ariz. Dep't of Revenue*, 875 P.2d 169, 179 (Ariz. Ct. App. 1994).
[14] *Phoenix Newspapers*, *supra*, 934 P.2d at 805.

evidence" test is admittedly "antiquated" (a relic of the First Restatement of Judgments rather than the contemporary Second), and the "transactional" test is the majority rule in the federal courts,[15] Arizona courts have continued to apply the "same evidence" test, expressly noting that "Arizona does not follow the modern trend, which clearly favors the transactional test."[16] Arizona courts have applied the "same evidence" test as recently as last month.[17]

B. The "Transactional" Test for Claim Identity

Under the "transactional" test for claim identity codified by the Second Restatement of Judgments, "[a] single claim cannot be split and includes all rights of the plaintiffs to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. [Citation]. Transaction is interpreted pragmatically by considering whether the underlying facts are related in time, space, origin, or motivation, and whether the parties would expect them to be treated as a unit for trial."[18] This creates a much narrower opportunity for plaintiffs to avoid preclusion, "extinguish[ing] a claim even though the plaintiff is prepared in a second action to present grounds or theories of the case not presented in the first action."[19]

The Arizona supreme court has never expressly adopted the "transactional" test.[20] Nonetheless, there appears to be confusion as to whether it represents Arizona law on claim preclusion. A good deal of this confusion arises from the rule that that federal law dictates the preclusive effect of a federal judgment,[21] while state law governs the preclusive effect of a state judgment.[22] Thus, state courts determining the preclusive effect of a federal judgment will use federal law on claim preclusion,[23] and federal courts determining the preclusive effect of a state judgment will use state law on claim preclusion.[24] This rule is causing confusion here because certain federal courts have been erroneously citing an Arizona decision that discusses federal preclusion law as establishing a proposition of Arizona preclusion law.

The leading source of this confusion appears to be an Arizona supreme court decision from 2006, *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 127 P.3d 882 (Ariz. 2006). In that case, the court discussed the transactional test for claim

[15] *Id.* at 804.
[16] *Goodman v. Greenberg Traurig, LLP*, No. 1 CA-CV 10-0154, 2011 WL 345849, at *7 (Ariz. Ct. App. Feb. 3, 2011).
[17] *See Molina v. BMO Harris Bank, N.A.*, No. 2 CA-CV 2022-0106, 2022 WL 16735929, at *2 (Ariz. Ct. App. Nov. 7, 2022)
[18] *Tumacacori Mission Land Dev., supra*, 297 P.3d at 926 (internal quotation marks omitted).
[19] *Id.* (cleaned up).
[20] *Lawrence T. v. Dep't of Child Safety*, 438 P.3d 259, 264 (Ariz. Ct. App. 2019).
[21] *Gila River, supra*, 127 P.3d at 887.
[22] *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 993 (9th Cir. 2001)
[23] *Gila River, supra*, 127 P.3d at 887.
[24] *Far Out Prods.*, 247 F.3d at 993.

preclusion at length,[25] expressly in the context of the *federal* law on claim preclusion that would dictate the preclusive effect of a *federal* judgment.[26] Inexplicably, however, *Gila River* and other Arizona cases citing it for propositions of *federal* preclusion law have been cited by some federal and state courts as establishing the transactional test as a proposition of *Arizona* law.[27]

To be sure, the Arizona supreme court has been flirting with the transactional test, but has never actually adopted it as a principle of Arizona law on claim preclusion. In one case, the court borrowed the test to apply in the evidentiary context (rather than claim preclusion context), even while acknowledging its explicitly federal pedigree.[28] In another case arising under Arizona law, the court referred to the transactional test, but did not apply it.[29] However, my research did not discover a case in which it adopted the test for claim preclusion as a matter of state law. The state's appellate courts have also noted the lack of such authority.[30] What is more, the federal cases noted above do not cite either of these cases, but rather *Gila River* and its progeny, which–again–were clearly discussing federal claim preclusion law.

C. The Split of Authority

Multiple Arizona appellate courts have recognized the apparent confusion regarding what actually constitutes Arizona law governing identity of claims for the purposes of claim preclusion. In a 2019 decision, *Lawrence T. v. Dep't of Child Safety*, 438 P.3d 259, 264 (Ariz. Ct. App. 2019), the court noted that while the state supreme court's references to "the transactional definition" of claim identity "might suggest our supreme court is inclined to adopt the transactional approach, until that change is explicitly announced we must apply the same evidence test," which it considered to be the governing test under Arizona law (even though it also recognized that it had previously "expressed dissatisfaction with the same evidence test and favorably discussed the transactional approach").[31] Another state appellate court has expressly recognized the split among the lower courts.[32] Compounding the split, while some federal courts have asserted that the "transactional" test is Arizona law (as noted above), other federal courts have recognized that the "same evidence" test properly governs Arizona law on claim

[25] *Gila River*, *supra*, 127 P.3d at 888-90.
[26] *Id.* at 887. The court ultimately declined to apply the transactional test (or any other test for claim identity), finding instead that the terms of the consent decree at issue limited the decree's preclusive effects. *Id.* at 890.
[27] *See, e.g.*, *Frenci v. Rush Auto Corporation LLC*, No. CV-22-00414, 2022 WL 4356916, at *2 (D. Ariz. Sept. 20, 2022) (purporting to "apply Arizona law" but applying the "transactional nucleus of facts" test for claim identity) (internal quotation marks omitted). The Ninth Circuit, too, has erroneously cited the "transactional" test as a rule of Arizona law on claim preclusion, *Barlow v. Arizona*, No. 21-15499, 2022 WL 418957, at *1 (9th Cir. Feb. 10, 2022), as have certain Arizona appellate courts, *see Heinig v. Hudman*, 865 P.2d 110, 115 (Ariz. Ct. App. 1993).
[28] *See Philips v. O'Neil*, 407 P.3d 71, 76 (Ariz. 2017).
[29] *See Crosby-Garbotz v. Fell*, 434 P.3d 143, 148 (Ariz. 2019).
[30] *Lawrence T.*, *supra*, 438 P.3d 259, 264.
[31] *Id.* (citing *Phoenix Newspapers*, *supra*, 934 P.2d at 805).
[32] *See Fann v. Cardenas*, No. 1 CA-CV 10-0087, 2011 WL 1948921, at *2 (Ariz. Ct. App. 2011) (noting split among different panels of same appellate court).

preclusion.[33] Thus, litigants appear to have adopted the practice of demanding the application of whichever test best achieves their ends.[34]

III. Implications for Litigation

A. Applying the "Same Evidence" Test Versus the "Transactional" Test

The "same evidence" test is much more favorable to potential plaintiffs. The test "allows litigants to recast their claims under new theories, implicating somewhat different facts than those involved in the prior action," such that "slight variations of the facts to support different theories of the same incident can result in a court finding different causes of action."[35] As a practical matter, plaintiffs can avoid claim preclusion under this test where they "assert a new theory in their second action, supported by some additional facts."[36]

This would aid plaintiffs because they could bring different theories based on different facts in subsequent litigation to avoid preclusion. If, for example, the plaintiff were to bring a claim for a declaratory judgment, it seems that the "same evidence" test would enable the same plaintiff to challenge the law's substantive validity in a second case and avoid preclusion because the second suit would involve different evidence. The evidence and causes of action brought to challenge the law's substantive validity would differ from the evidence adduced to prove the declaratory judgment claim. Additionally, the evidence adduced for each substantive theory would likely differ.

Based on Arizona precedent, even where the claims involved in both proceedings arise from challenges to the same policy/event, if they are brought under different causes of action that involve different evidence, the "same evidence" test for claim preclusion will not bar them. In *Phoenix Newspapers*, for example, the dismissal of an initial complaint seeking declaratory and injunctive relief in a challenge to a policy's constitutionality on press freedom grounds did not preclude a subsequent complaint seeking declaratory and injunctive relief from the exact same policy on equal protection grounds.[37] This reasoning would seem to contemplate subsequent challenges to the same law(s) under distinct constitutional theories.

By contrast, the "transactional test" would bar a second suit where "the same occurrence" "underl[ies] both theories."[38] Under this test, "[i]f the new claim is closely related to the first–because it arises out of the same events–it could and should have been asserted in the first

[33] *See, e.g.*, *Power Road-Williams Field LLC v. Gilbert*, 14 F. Supp. 3d 1304, 1309 (D. Ariz. 2014); *Brown v. Newrez LLC*, No. CV-19-028889, 2019 WL 5490472, at *3 (D. Ariz. Oct. 22, 2019).
[34] *See Fann*, *supra*, 2011 WL 1948921, at *2.
[35] *Phoenix Newspapers*, *supra*, 934 P.2d at 805.
[36] *Id.*
[37] *Id.* at 803-04.
[38] *See id.* at 805.

action," preventing plaintiffs from "reviv[ing] essentially the same cause of action under a new legal theory."[39] This would appear to bar an attempt to challenge the same law on different grounds in successive actions.[40]

B. Strategic Implications and Conclusion

Thus, the "same evidence" test is clearly favorable to plaintiffs and should govern as a principle of Arizona preclusion law. However, there may be other strategic considerations to weigh due to the split of authority regarding which test is prevailing law.

The persistence of the "same evidence" test has a strong foundation in Arizona law, and courts continue to apply it. The supreme court has never explicitly adopted the "transactional" test, and the authority supporting the "transactional" test as Arizona law appears to be completely circular, with federal courts citing state decisions clearly interpreting the federal law on issue preclusion as determinative of state law on the matter.

Regardless, state and federal courts have nonetheless been (erroneously) treating the "transactional" test as a feature of Arizona law, and it is the majority rule in the federal courts. Additionally, there are some clear policy rationales that have spurred the modern trend of adopting the "transactional" test that have been referenced favorably by the Arizona supreme court.[41] Thus, plaintiffs may have to be ready to litigate this issue all the way to the state supreme court if a future defendant wants to press the case for adopting the "transactional" test, or if plaintiffs appeal a decision by a lower court that erroneously applies the "transactional" test.

---

[39] *Id.*

[40] Note that courts following the "transactional" test from the Second Restatement have recognized two exceptions to its rule of claim preclusion: a claim will not be precluded where 1) the first court expressly reserves the plaintiff's right to maintain the second action, or 2) the first court could not hear the claim the plaintiff is bringing in the second action because of subject matter jurisdiction limitations (e.g. an amount in controversy cap in small claims court) or a lack of authority to entertain multiple theories or claims for multiple forms of relief. *Heinig, supra*, 865 P.2d at 115. Courts have also noted that claim preclusion should not be "rigidly applied when it would contravene an overriding public policy or result in manifest injustice." *In re Marriage of Gibbs*, 258 P.3d 221, 225 (Ariz. Ct. App. 2011) (cleaned up).

[41] *See Crosby-Garbotz v. Fell, supra*, 434 P.3d at 148 (in dicta, discussing transactional test).

JACOB MILES SEIDMAN

(617) 999-5568 • 3166 26th St., Unit 3, San Francisco CA 94110 • jakeseid77@gmail.com

WRITING SAMPLE

The attached writing sample is a research memorandum that I prepared during my summer 2021 internship in the Civil Rights Enforcement Section of the California Department of Justice. This memo was produced as part of my work on the California Department of Justice's reforms to local police policies and practices. I conducted all the research myself, and a draft of this memo was minimally edited by the supervising attorney for whom I completed the assignment. I am submitting this memo with the permission of the California Department of Justice.

State of California **Department of Justice**

M e m o r a n d u m

To: Joshua Piovia-Scott
Deputy Attorney General
Civil Rights Enforcement Section

Date: June 21, 2021
Telephone: 617-999-5568
Facsimile:
E-mail: jacob.seidman@doj.ca.gov

From: Jake Seidman
Summer Intern
Civil Rights Enforcement Section
Public Rights Division

Subject: Administrative and Criminal Investigations under POBRA

RESEARCH QUESTION

Does California's Public Safety Officers Procedural Bill of Rights Act place any constraints on the deployment of both administrative and criminal investigations by a law enforcement agency into alleged officer misconduct?

INTRODUCTION AND SUMMARY

California's Public Safety Officers Procedural Bill of Rights Act (POBRA) is codified at California Government Code section 3300 et seq. Its purpose is to ensure effective law enforcement by maintaining stable relationships between public safety officers and their employers. (Gov. Code, § 3301.) Most relevant here are its provisions that establish rules governing administrative investigations and interrogations of officers and codify officers' procedural rights in disciplinary proceedings. (Gov. Code, §§ 3303, 3304.)

An analysis of POBRA's text as well as the case law construing its relevant provisions shows that the law presents no barrier to conducting both administrative and criminal investigations into alleged officer misconduct. The law clearly contemplates the possibility that

these investigations may occur alongside each other on parallel tracks and further disfavors hybrid criminal/administrative investigations closely involving the employing law enforcement agency.

I. THE LAW RECOGNIZES THAT THERE MAY BE DISTINCT ADMINISTRATIVE AND CRIMINAL INVESTIGATIONS INTO THE SAME ALLEGED OFFICER MISCONDUCT

A. The Text of POBRA Clearly Contemplates the Existence of a Distinct Administrative Investigation into Alleged Officer Misconduct

POBRA's text clearly contemplates the possibility that an employing law enforcement agency will engage in an administrative investigation into alleged officer misconduct distinct from any criminal investigation into that conduct. First and foremost, POBRA's provisions governing investigations and interrogations only apply in administrative, not criminal, investigations and interrogations. (See Gov. Code, § 3303, subd. (i) ("This section shall not apply to . . . an investigation concerned solely and directly with alleged criminal activities."); *Van Winkle v. County of Ventura* (2007) 158 Cal.App.4th 492, 497 [69 Cal.Rptr.3d 809].) Other subdivisions provide for the tolling of POBRA's statute of limitations on administrative investigations during the pendency of a criminal investigation or prosecution, further showing the statute's contemplation of the possibility that an officer may be subject to both administrative and criminal investigations. (See Gov. Code, § 3304, subd. (d)(2)(A) (tolling statute of limitations on administrative investigation where the alleged misconduct "is also the subject of a criminal investigation or criminal prosecution").)

B. The Relevant Case Law Further Reflects the Reality That Administrative and Criminal Investigations into Alleged Officer Misconduct Can and Do Co-Occur

The leading California Supreme Court case interpreting POBRA clearly reflects an understanding that administrative and criminal investigations are likely to co-occur. In *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822 [221 Cal.Rptr. 529, 710 P.2d 329] (*Lybarger*), the

California Supreme Court construed POBRA's provisions regarding testimony compelled from a police officer in an administrative investigation in order to determine whether the officer could be disciplined by his employer for invoking his Fifth Amendment right to silence. (*Id.* at p. 826.) The court found that POBRA explicitly permits the compulsion of officer testimony during an administrative interrogation via threat of disciplinary sanction as long as the officer is advised of his constitutional rights if he may also be charged with a crime. (*Id.* at pp. 827-829.) In so holding, the court noted that:

> [A]lthough the officer under investigation is not compelled to respond to potentially incriminating questions, and his refusal to speak cannot be used against him *in a criminal proceeding*, nevertheless such refusal may be deemed insubordination leading to punitive action by his employer. Seen in this light, the right to remain silent is not a "hollow" right: It may be exercised without fear of *penal* sanction.

(*Id.* at p. 828 (emphasis in original).)

This reasoning clearly contemplates the co-occurrence of administrative and criminal investigations into an officer's conduct.

Subsequent decisions by lower courts have explicitly parsed *Lybarger*'s implications for the temporal relationship between administrative and criminal investigations into alleged officer misconduct:

> The indisputable import of *Lybarger* is that the two actions may, in fact, proceed simultaneously. Certainly, the criminal action need not be delayed. And if administrative action had to await the conclusion of criminal proceedings, the system of use and derivative use immunity adopted in *Lybarger* would be pointless. [Citation.] Hence, the proceedings may occur side by side and, ideally, they would move along entirely separate tracks, each progressing as though the other did not exist. . . . [¶] Under *Lybarger*, the officer's statement is protected within the context of criminal proceedings but not within the context of administrative proceedings.

(*People v. Gwillim* (1990) 223 Cal.App.3d 1254, 1268 [274 Cal.Rptr. 415] (*Gwillim*).)

As the *Gwillim* court suggests, the ideal procedure for these investigations is one in which administrative and criminal investigations proceed simultaneously on separate tracks. Such procedure is key for expeditiously implementing discipline or reforms in cases where an officer has acted improperly, as well as speedily clearing innocent officers of the pall of an overhanging investigation.

From a management perspective, having both investigations proceed simultaneously or in quick succession is also the surest way to avoid potential issues with POBRA's statute of limitations on administrative investigations, which requires that such investigations be completed within a year of the discovery of the alleged misconduct at issue. (Gov. Code, § 3304, subd. (d)(1).) However, these actions need not proceed simultaneously, as POBRA's one-year statute of limitations on administrative investigations is tolled during the pendency of a criminal investigation or prosecution concerning the same subject. (Gov. Code, § 3304, subd. (d)(2)(A); *Daugherty v. City & County of San Francisco* (2018) 24 Cal.App.5th 928, 958 [234 Cal.Rptr.3d 773].) The existence of this provision again signals the statute's contemplation of the reality that administrative and criminal investigations into the same conduct may proceed together.

II. PRACTICES THAT COMMINGLE ADMINISTRATIVE AND CRIMINAL INVESTIGATIONS' PERSONNEL AND PROCEDURES MAY INCREASE AN EMPLOYING AGENCY'S EXPOSURE FOR VIOLATIONS OF POBRA

If POBRA does contain any constraints on the deployment of administrative and criminal investigations in the same case, they appear to militate in favor of engaging in two distinct investigations, rather than trying to append the administrative investigation onto the criminal investigation by asking questions pertinent to administrative review through a District Attorney or other independent investigator engaged in a criminal investigation. This practice may unintentionally increase the employing law enforcement agency's exposure to suits challenging

the legitimacy of its disciplinary actions by blurring the line between a criminal investigation that does not require POBRA protections and an administrative one that does.

A. Officers Challenging Disciplinary Actions Frequently Assert That Criminal Investigations Involving Their Employing Agency Have Been Brought in Order to Impose Administrative Discipline While Evading POBRA Protections

As noted above, POBRA's protections do not apply at all to questioning conducted in the course of an investigation "concerned solely and directly with alleged criminal activities." (Gov. Code, § 3303, subd. (i).) For this reason, officer plaintiffs in suits challenging disciplinary actions often argue that criminal investigations involving their law enforcement employers (as opposed to a separate law enforcement agency) are actually an inequitable means to the end of imposing administrative sanctions while evading POBRA's due process protections. (*Daugherty v. City & County of San Francisco*, *supra*, 24 Cal.App.5th at pp. 957-958; *Department of Corrections & Rehabilitation v. State Personnel Bd.* (2016) 247 Cal.App.4th 700, 713 [202 Cal.Rptr.3d 732]; *Van Winkle v. County of Ventura*, *supra*, 158 Cal.App.4th at pp. 498-500; *California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 308 [98 Cal.Rptr.2d 302].)

Officer plaintiffs sometimes even argue that POBRA must implicitly contain a prohibition on criminal investigations conducted by law enforcement employers into their own employees in order to preclude such abusive sham investigations. (*California Correctional Peace Officers Assn. v. State of California*, *supra*, 82 Cal.App.4th at p. 308.) Courts usually reject this reading of POBRA and treat the assertion about sham criminal investigations as one that must be proven as a matter of fact. (*Daugherty v. City & County of San Francisco*, *supra*, 24 Cal.App.5th at pp. 951, 957-958; *Department of Corrections & Rehabilitation v. State Personnel Bd.*, *supra*, 247 Cal.App.4th at p. 713; *Van Winkle v. County of Ventura*, *supra*, 158 Cal.App.4th

at pp. 498-500. But see *California Correctional Peace Officers Assn. v. State of California*, *supra*, at pp. 308-309.) When administrative and criminal investigations are clearly being undertaken on separate tracks by different law enforcement entities or units within an employing department, courts tend to find that the facts do not support allegations of a sham criminal investigation undertaken to avoid POBRA. (E.g., *Daugherty v. City & County of San Francisco*, *supra*, at p. 951; *Van Winkle v. County of Ventura*, *supra*, at p. 498.)

B. Where an Administrative Investigation is Too Closely Intertwined with a Criminal Investigation, Courts May Find That POBRA Protections are Required

Where an employing agency appears to be closely involved in a criminal investigation that might have administrative implications, courts may find that POBRA protections are required. (See *California Correctional Peace Officers Assn. v. State of California*, *supra*, 82 Cal.App.4th at pp. 306-307 (finding that employing law enforcement agency and outside law enforcement agency undertaking criminal investigation were so closely intertwined in their actions as to require POBRA protections notwithstanding putatively criminal nature of investigation).) In light of the fact-specific nature of this inquiry, posing questions pertaining to administrative review through personnel engaged in a criminal investigation may actually increase an employing law enforcement agency's exposure due to the apparent conflation of administrative and criminal personnel and procedures (at least where officers are not given POBRA rights during the challenged investigation).

This exposure risk is particularly worth considering in the context of criminal investigations into alleged officer misconduct other than officer involved shootings (OIS). Investigations into such non-OIS misconduct may be more likely to be conducted by employing agencies rather than an independent investigator whose special investigative mandate only

covers officer involved shootings. In cases where there is no outside law enforcement agency whose presence clearly delineates the criminal and administrative investigations but where the employing law enforcement agency is conducting both, the agency should take additional care to prevent the appearance of a mixed criminal and administrative investigation.

An agency could theoretically avoid these exposure risks by ensuring that officers have full POBRA rights during criminal investigations. However, this would place a significant and legally unnecessary burden on criminal investigations into alleged officer misconduct and would go beyond POBRA to grant officers additional privileges that are not generally given to subjects of criminal investigations. Both these issues could be avoided by conducting completely separate administrative and criminal investigations into alleged officer misconduct. Such policy is clearly legally permissible in California, if not outright favored. (See *People v. Gwillim*, *supra*, 223 Cal.App.3d at p. 1268.)

CONCLUSION

The statutory text of POBRA and case law interpreting its relevant provisions are clear: investigations for the purpose of administrative review of alleged officer misconduct can and should proceed alongside any criminal investigation into that conduct. Furthermore, criminal investigations that too closely involve administrative personnel or purposes can increase an employing agency's exposure and should be approached with caution.

Applicant Details

First Name	**Samuel**
Middle Initial	**E**
Last Name	**Sokolsky**
Citizenship Status	**U. S. Citizen**
Email Address	**sam.sokolsky@arnoldporter.com**
Address	**Address** Street **3408 Clay St.** City **San Francisco** State/Territory **California** Zip **94118** Country **United States**
Contact Phone Number	**6504008386**

Applicant Education

BA/BS From	**Grinnell College**
Date of BA/BS	**May 2017**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 12, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Ecology Law Quarterly**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate, Immigration**

Recommenders

Roth, Andrea
aroth@law.berkeley.edu
Badawi, Adam
abadawi@berkeley.edu
Schlosberg, Deborah
dschlosberg@berkeley.edu

References

Fraser Muir
Associate Attorney
415-655-8129
fmuir@bwslaw.com
Burke, Williams & Sorenson, LLP, 1 California St, Ste 3050, San Francisco, CA 94111-5432
(Was my supervising attorney at the Public Law Center)

Andrea Roth
Professor of Law
aroth@law.berkeley.edu
510-643-6092
University of California, Berkeley, School of Law
347 Law Building (North Addition)
Berkeley, CA 94720

Adam Badawi
Professor of Law
abadawi@law.berkeley.edu
510-643-6116
University of California, Berkeley, School of Law
889 Simon Hall

Berkeley, CA 94720

Deborah S. Schlosberg, Esq.
Director, Pro Bono Program
dschlosberg@law.berkeley.edu
510-664-4614
University of California, Berkeley, School of Law
472 Law Building
Berkeley, CA 94720

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Samuel Ezra Sokolsky
3408 Clay Street, San Francisco, CA 94118 | 650-400-8386 | samsokolsky@berkeley.edu

June 18, 2023
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am a 2022 graduate from the University of California, Berkeley School of Law, and current litigation associate at Arnold & Porter Kaye Scholer LLP. I am writing to apply to clerk in your chambers and am interested in clerking in either the 2023-2024 or 2024-2025 term.

I have a diverse array of work experiences through law school and the beginning of my legal career that will prove useful in the fast paced environment of the Northern District of California. As a clerk in your chambers, I will bring strong legal research and writing skills, a tenacious and meticulous work ethic that ensures all cases receive their due attention, and an open minded approach to all cases and assignments. As a law student, I worked at the East Bay Community Law Center, the Public Law Center, and Kids in Need of Defense. Working at each of these organizations required balancing a busy caseload of matters before the USCIS, Immigration Courts, habeas proceedings in Federal District Courts, and appeals before the Ninth Circuit Court of Appeals. Most importantly, through these experiences working closely with clients, I have seen first-hand the importance of every motion and brief to the respective litigant, and because of this as a clerk I am committed to making sure each case and litigant receives equal justice and attention.

At Arnold & Porter Kaye Scholer LLP, I have gotten experience conducting legal research, counseling clients on appropriate courses of action, working efficiently and accurately during discovery, and drafting motions and briefs both at the trial court and appellate levels. I have gotten experience in intellectual property litigation, commercial and business litigation, and immigration litigation, and through these matters learned to work collaboratively in small and large teams. Most significantly, I have gotten the opportunity to take the lead on drafting the initial version of a federal circuit appeal.

Getting the opportunity to clerk in your chambers would fit in perfectly with my past experiences and my future career goals. After clerking, I plan to continue my career in litigation working for a governmental or non-profit organization. Additionally, I plan to build my career litigating in the Northern District of California and the bay area and clerking here will be invaluable for those goals.

Please find my resume, law school transcript, and writing sample attached. Please contact me for any additional requested materials.

Thank you for your consideration.

Sincerely,
Samuel Sokolsky (he/him/his pronouns)

Samuel Ezra Sokolsky

3408 Clay Street, San Francisco, CA 94118 | 650-400-8386 | samsokolsky@berkeley.edu

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
J.D., May 2022

Honors: Pro Bono Champion Award
1L Honors: no honors conferred due to COVID-19
2L Honors: Top 10%
3L Honors: Top 25%

Activities: Berkeley Law Alternative Service Trips Central Valley, Leader
Project ANAR (Afghan Network for Advocacy & Resources), Pro Bono Volunteer
Ecology Law Quarterly, Associate Editor

Grinnell College, Grinnell, IA
B.A. in Biology and Concentration in Environmental Studies, May 2017

Honors: Grinnell College Trustee Honor Scholarship
Dean's List, Fall 2015, Fall 2016 and Spring 2017

Activities: Student Environmental Committee
NCAA Varsity Cross Country and Track and Field

EXPERIENCE

Arnold & Porter Kaye Scholer LLP, San Francisco, CA — May 2021-July 2021, October 2022-present
Associate (former Summer Associate)
Representing clients on a range of commercial, intellectual property, immigration, and appellate litigation matters, in both federal and state court. Researching and analyzing legal issues, drafting appellate briefs and dispositive motions, and counseling clients on litigation risk of various proposed actions.

Public Law Center, Santa Ana, CA — April 2020–December 2020, January 2022-May 2022
Legal Intern
Worked toward the release of detained immigrants. Worked on Ninth Circuit appeals. Conducted intakes, wrote humanitarian parole requests, custody redetermination letters, emergency stay of removals, bail applications, asylum applications, SIJS proceedings, and prosecutorial discretion requests.

East Bay Community Law Center, Berkeley, CA — January 2021–December 2021
Legal Intern
Represented immigrants before Immigration Court, USCIS, and State Courts. Worked on U Visas, Asylum Applications, U Visas, TPS, DACA, SIJS, and prosecutorial discretion requests.

Fire Victim Trust/ BrownGreer PLC, Richmond, VA — July 2020–May 2021
Pro Se Liaison
Assisted pro se claimants in filing claims, gathering correct evidentiary documents, and navigating the claims process for the $14 billion PG&E settlement for the 2015 Butte Fire, 2017 North Bay Fires, and 2018 Camp Fire.

Philadelphia District Attorney's Office, Philadelphia, PA — June 2020–August 2020
Legal Intern
Reviewed trial documents, participated in mock trial, and assisted in the operations of the office as it adapted to the COVID-19 crisis. Received training in substantive and procedural aspects of prosecuting a criminal case.

Running Room, St. Paul, Minnesota — February 2018–June 2019
Manager
Oversaw staff of fifteen employees. Hired and trained new employees. Implemented community outreach strategies. Planned and executed events.

INTERESTS

Distance Running and Cycling, Brewing Kombucha, Cooking.

Official Academic Transcript from:
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW
OFFICE OF THE REGISTRAR
270 SIMON HALL
BERKELEY, CA 94720-7200

TELEPHONE: 510-643-2278

Document Type: THIRD-PARTY SECURE PDF

Official Academic Transcript of:
SAMUEL SOKOLSKY
Transcript Created: 21-Jun-2022

Intended Recipient:
SAMUEL SOKOLSKY
734 OREGON AVENUE
SAN MATEO, CA 94402-3306

E-Mail: samsokolsky@berkeley.edu

Requested by:
SAMUEL SOKOLSKY
734 OREGON AVENUE
SAN MATEO, CA 94402-3306

E-Mail: samsokolsky@berkeley.edu

Delivered by:
Parchment, LLC
Under Contract To:
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW
Order Number: 2FN767272- 2
Telephone: (847) 716-3005

Statement of Authenticity

This Official Academic Transcript in Portable Document Format (PDF) was requested by the individual identified above in compliance with the provisions of the Family Educational Rights and Privacy Act of 1974 as Amended and in conformance with the prescribed ordering procedures of University of California, Berkeley, School of Law who has contracted with Parchment, LLC of Scottsdale, AZ for electronic delivery of Official Academic Transcripts in PDF form. You may verify the authenticity of our relationship with University of California, Berkeley, School of Law by visiting their website at https://www.law.berkeley.edu/academics/registrar/transcripts/.

Colleges and Universities

If you are an accredited post-secondary academic institution, please be advised that you are receiving this transcript as a "Third-Party" receiver. Since you are not registered to our Parchment Receive service, additional security provisions have been added to this document to prevent content copying or alteration. You also are not permitted to print the document without watermark protections or add notations to the document when saving to your student information system. Should you wish to receive future documents through our electronic networks without these additional security features, please register your institution at https://info.parchment.com/compare_receive.html.

Privacy and Other Information

This Official Academic Transcript is for delivery to the above-named "Intended Recipient". If you are not the "Intended Recipient", please notify the Office of the Registrar at University of California, Berkeley, School of Law. You are not permitted to copy or alter this document. You may not forward this document or disclose its contents to any person or organization other than the "Intended Recipient" without the express written permission of the student. If this document is copied or printed, the words "PRINTED COPY" will appear in the replicated transcript image.

In the interest of security and privacy, we delete this Official Academic Transcript from our server 48 hours after it is initially downloaded excluding weekends and holidays. If a replacement is subsequently needed, the requesting party must order another transcript from University of California, Berkeley, School of Law. If you have any questions about this document please contact Parchment Customer Service at (847) 716-3005. Our operators are available from 7:00 am to 7:00 pm Monday through Friday (Central Time).

Berkeley Law
University of California
Office of the Registrar

Samuel Sokolsky
Student ID: 3034672473
Admit Term: 2019 Fall

Degrees Awarded

Juris Doctor 05/11/2022

Academic Program History

Major: Law (JD)

Awards

Prosser Prize 2021 Spr: Business Associations

2019 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Sean Farhang	5.0	5.0	H
LAW	201	Torts Daniel Farber	5.0	5.0	P
LAW	202.1A	Legal Research and Writing Michelle Cole	2.0	2.0	CR
LAW	230	Criminal Law Andrea Roth	4.0	4.0	H

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2020 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Michelle Cole	2.0	2.0	CR
LAW	202F	Contracts Mark Gergen	5.0	5.0	CR
LAW	203	Property Ian Haney Lopez	4.0	4.0	CR
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Erwin Chemerinsky	4.0	4.0	CR
LAW	234.21	Dismantling Mass Incarceration Antony Cheng	1.0	1.0	CR

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	32.0	32.0

* **Due to COVID-19, law school classes were graded credit/no pass in spring 2020.**

2020 Fall

Course		Description	Units	Law Units	Grade
LAW	226.8	Strat Con Lit Prop Rgts&Ec Lib John Groen	1.0	1.0	CR
LAW	231	Crim Procedure-Investigations Orin Kerr	4.0	4.0	HH
LAW	241	Evidence Andrea Roth	4.0	4.0	HH
LAW	241.3	Consumer Lit: The Crs of Case **Units Count Toward Experiential Requirement** Kristen Sagafi	2.0	2.0	P
LAW	288.1	Immigration Law Letitia Volpp	4.0	4.0	P

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	47.0	47.0

2021 Spring

Course		Description	Units	Law Units	Grade
LAW	210	Legal Profession **Fulfills Professional Responsibility Requirement** Merri Baldwin	2.0	2.0	P
LAW	250	Business Associations Adam Badawi	4.0	4.0	HH
LAW	275.3	Intellectual Property Law Peter Menell	4.0	4.0	HH
LAW	289	EBCLC Seminar Seema Patel	2.0	2.0	CR
LAW	295.5Z	EBCLC Clinic **Fulfills Writing Requirement** Seema Patel	4.0	4.0	CR

	Units	Law Units
Term Totals	16.0	16.0

Carol Rachwald, Registrar

Berkeley Law
University of California
Office of the Registrar

Samuel Sokolsky
Student ID: 3034672473
Admit Term: 2019 Fall

	Units	Law Units
Cumulative Totals	63.0	63.0

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	222	Federal Courts Erwin Chemerinsky	4.0	4.0	HH
LAW	251.52	Economics of Corp & Secur Lit. Matthew Cain	1.0	1.0	CR
LAW	252.2	Antitrust Law Prasad Krishnamurthy	4.0	4.0	H
LAW	255.5	Securities Regulation Robert Bartlett	4.0	4.0	H
LAW	295.5Y	Advanced EBCLC Clinic **Units Count Toward Experiential Requirement** Seema Patel	3.0	3.0	CR

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	79.0	79.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	223	Administrative Law Kenneth Bamberger	4.0	4.0	H
LAW	258	Estates and Trusts Romboud Rahmanian	3.0	3.0	P
LAW	277.1	Trade Secret Law Rebecca Wexler David Almeling	3.0	3.0	H

	Units	Law Units
Term Totals	10.0	10.0
Cumulative Totals	89.0	89.0

Carol Rachwald, Registrar

University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

This Academic Transcript from The University of California Berkeley Law located in Berkeley, CA is being provided to you by Credentials Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Credentials Inc. of Northfield, IL is acting on behalf of University of California Berkeley Law in facilitating the delivery of academic transcripts from The University of California Berkeley Law to other colleges, universities and third parties using the Credentials' TranscriptsNetwork™.

This secure transcript has been delivered electronically by Credentials Inc. in a Portable Document Format (PDF) file. Please be aware that this layout may be slightly different in look than The University of California Berkeley Law's printed/mailed copy, however it will contain the identical academic information. Depending on the school and your capabilities, we also can deliver this file as an XML document or an EDI document. Any questions regarding the validity of the information you are receiving should be directed to: Office of the Registrar, University of California Berkeley Law, 270 Simon Hall, Berkeley, CA 94720-7200, Tel: (510) 642-2278.

May 10, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to recommend Sam Sokolsky for a clerkship in your chambers. Sam was a top student in both my Fall 2020 Evidence class and Fall 2019 Criminal Law class. I highly recommend him for a clerkship.

Analytical and writing ability. Sam earned a coveted High Honors grade in my 110-person Evidence class, having almost aced the notoriously difficult multiple choice exam and written a thoughtful policy essay. He also easily earned an Honors grade (he was in the top 30%) of my 108-person Criminal Law class, based on both quality of in-class participation and also a final exam with a multiple choice, policy essay, and issue spotter question. Sam did not speak frequently in class, but when he did, he always had something thoughtful to say. He also occasionally asked his questions via email, which were also always thoughtful (e.g. once he had some deeper questions about Frye versus Daubert that he wanted to figure out, but didn't want to ask in class). I always felt he wasn't showing off to me or his peers and instead just wanted to figure it out.

Sam also had a particularly lovely courtroom observation essay in Criminal Law, an ungraded assignment based on watching arraignment court in downtown Oakland for 2 hours. What struck me was that the writing was lovely (nice turns of phrase), he obviously took time with the assignment, even though it was ungraded, and that he really captured the contradictory nature of both the "weight and informality" (his phrase) of the hurried deals.

Given his performance in Evidence and Criminal Law, it doesn't surprise me that Sam was an academic superstar in other classes – a full five HHs (top 10%) including a "Prosser Prize" (second best grade in the class) in large doctrinal classes, doubly impressive given that one semester was Credit/No Credit (ungraded) due to COVID.

Personality and work ethic. Sam has demonstrated an impressive commitment to public service, most notably receiving the top graduating 3L prize for pro bono contributions, and not only going to the Central Valley on his spring break to do pro bono work but coordinating the trip for all the other 3L volunteers. He also worked in one of our more labor intensive clinics- the East Bay Community Law Center's Immigration Clinic, and worked with not just one but two student-led service projects his 1L year (which don't give you any clinic credit and are only labors of love and service). Sam also has a lovely demeanor, polite but confident, and easy to get along with. His intellectual curiosity is perhaps best reflected in his favorite classes – complex civil litigation and civil procedure.

Interest in clerking. Sam's list of judges is thoughtful; he wants to clerk for a district court and hopes to enter government service or the non-profit world. He comes to you with a nice mix of having worked at a firm (learning high levels of practice, and continuing his pro bono work) and having a demonstrated service ethic.

In sum, Sam would be a great federal clerk. Please do not hesitate to contact me by cell phone, 202-669-6565, or e-mail, aroth@law.berkeley.edu, with any questions.

Very truly yours,

Andrea Roth
Professor of Law
UC Berkeley School of Law

May 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write with enthusiasm to recommend Sam Sokolsky for a clerkship in your chambers. Sam is a smart and accomplished lawyer who I believe would thrive as a law clerk. He was an excellent law student here at Berkeley, is doing well as a practicing attorney, and he has shown a continual commitment to public interest work.

I got to know Sam when he was a student in my Business Associations class during the Spring of 2021. I taught this entire class online as we were still in the throes of the pandemic at the time. Under those conditions, which tended to limit student engagement and discussion, I was especially grateful to have Sam as a student. He consistently made insightful observations about the class material and asked questions that I had not heard before. It came as little surprise when Sam's name was near the top of the class when I finished grading. I awarded Sam the Prosser Prize, which we can give to the student who receives the second-highest score in a class. I do not always award that prize, but when a student writes an exam that is distinctly good and is within range of the top prize, as Sam's exam was, I do.

In addition to his acumen, I appreciate Sam's open mind. I do not think that Sam came into law school wanting to study or practice business law. His interests were largely focused on environmental law and related areas. But he found the business law topics that my colleagues and I teach to be genuinely interesting and has since reoriented his career around those interests. He aspires to work at the Securities and Exchange Commission or the Federal Trade Commission to combine his interest in those areas. That will allow him to combine the interest that he found in business topics with his commitment to the public interest through public service.

Writing ability is naturally important to one's potential success as a law clerk. When I have only had exposure to a student's writing on law school exams, I generally refrain from saying much about their writing ability. The time pressure in that context does not, in my experience, reflect what a student may do with fewer constraints. In Sam's case I can make an exception for two reasons. The first is that, even under those timed conditions, Sam's exam produced very readable and well thought out prose. His writing is unadorned and straightforward, which is a refreshing change from what some law students write on exams. Second, it is evident from his resume that Sam likes to write. He wrote a thirty-page brief for a law school class, had several more writing intensive clinical projects, and as a litigator he has done significant writing that includes important appellate work on the Lanham Act. I am confident that Sam can write at the high level that is required to be an effective clerk.

Beyond his intelligence and talent, Sam is also a delightful person. He has been unfailingly courteous and respectful in our interactions. I have no doubt that he would be a warm and welcome presence in any chambers. If you have any questions or I can be of any other assistance, please do not hesitate to contact me.

Sincerely,

Adam B. Badawi

Adam Badawi - abadawi@berkeley.edu

May 5, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write enthusiastically to support Sam Sokolsky's application to clerk in your chambers. Sam's drive, intellectual curiosity, organization, and writing ability will make him an excellent law clerk.

As the Director of the Pro Bono Program at Berkeley Law, I have the great pleasure of working with hundreds of law students each year. The Pro Bono Program at Berkeley Law affords law students the opportunity to engage in meaningful client service under the supervision of licensed attorneys as early as their first semester of law school. Students can engage in direct service work on behalf of low-income clients, conduct research projects in furtherance of the public interest, or perform outreach and education of the community on their legal rights in a variety of substantive areas. Out of the thousands of pro bono students at Berkeley Law that I have worked with, Sam is at the very top of the list.

I first met Sam in the Fall Semester of his first year as a student at Berkeley Law. I was immediately impressed with his maturity and commitment to pro bono opportunities. As a first-year student, Sam joined two pro bono projects, one focused on consumer rights and another focused on reproductive justice. Through these projects, Sam drafted persuasive demand letters, prepared thorough complaints, and wrote detailed memoranda and trial briefs. Most importantly, Sam displayed compassion and care when conducting intake interviews with clients. Sam was almost always one of the last student volunteers to leave his workshop's bi-weekly clinics—not because he was slow to finish his work, but because he was always eager to jump into new projects and help clients.

It was clear from my early interactions with Sam that he would become one of my pro bono student leaders. Indeed he did. However, before Sam completed his first year of law school, COVID-19 interrupted life and legal education. Like all of our students, Sam was forced to finish his first year of law school and second year of law school remotely. For some law students, remote education resulted in disconnect and dissolution. Sam responded to COVID-19 in the opposite fashion, with motivation and commitment.

Since March 2020, Sam has assisted low-income clients applying for immigration relief as a volunteer with the Public Law Center. Sam worked 80-hour weeks his 1L summer: working a full-time legal internship by day, while taking on almost a second full-time job in the form of pro-bono immigration work to comprise the additional 40 hours a week. He continued to engage in this work as a 2L as well.

Then, when the law school returned to in-person education, Sam walked through our doors as a 3L more eager than ever to serve the community and be a leader. Two-thirds of the law student population had never set foot on campus and the institutional knowledge students carry with them through law school was largely lost. Sam responded by taking on the important role of co-leader of our Berkeley Law Alternative Service Trip (BLAST) to California's Central Valley.

As a BLAST leader, Sam secured the agreement of two legal services organizations, Central California Legal Services and Kids in Need of Defense, to partner and supervise our students' legal work. Next, Sam and his co-leader recruited students to join him in the work. Sam's ability to connect and inspire his peers led to eight students committing their Spring Break to work full-time in Fresno, California, providing free civil legal services. Sam then conducted monthly meetings with his co-leader and eight students from September to March preparing his colleagues and himself so that they could be successful as soon as they landed in Fresno. He carefully selected readings, brought in expert speakers, and conducted trainings that students could immerse themselves in to understand the historical, political, and cultural dimensions of the work they would be doing. This group of ten students then provided free legal services for a full week over Spring Break, expanding the services to deserving clients and developing legal skills all the while.

During his three years of law school, Sam recorded nearly six hundred hours of pro bono work. He dedicated this time to the public interest while taking a full course load and earning stellar grades. As a result of his dedication to pro bono service and leadership of others, Sam received the highest honor we provide to law students at graduation, the Pro Bono Champion Award. Since graduating, Sam has gone on to work at the law firm of Arnold & Porter, where he continues to excel.

At the beginning of my own legal career, I had the great pleasure of clerking for the Honorable Jeremy D. Fogel of the United States District Court for the Northern District of California. This experience taught me about the intellectual and personal qualities necessary to excel as a law clerk. Sam's work ethic, research and writing skills, self-motivation, and organization will make him an asset to chambers. Equally important, his kindness and good humor will make him a welcome colleague to both you and his co-clerks. I could not recommend Sam's application to be a clerk in your chambers more highly.

If I can be of any further assistance in your review of his application, please feel free to contact me.

Sincerely,

Deborah Schlosberg - dschlosberg@berkeley.edu

Deborah Schlosberg
Director, Pro Bono Program
UC Berkeley, School of Law

Deborah Schlosberg - dschlosberg@berkeley.edu

Writing Sample for Samuel Ezra Sokolsky

The following is one part of the argument section of an appellate brief. This work is used with the permission of Samuel Sokolsky's employer and represents an early draft of the brief that is entirely Samuel Sokolsky's work, unedited by others.

The following section is part of a response brief, urging the court to affirm the dismissal of a false advertising claim under section 43(a) of the Lanham Act. The first section (not included here) focused on how the claims were barred by the Supreme Court's decision in *Dastar*. The second section (of which this writing sample is the first subsection of) focused on how the appellants' claims fall outside the proper meaning of the statute.

A. Appellants' claims against Appellee under section 43(a)(1)(B) of the Lanham Act fail for additional reasons.

1. Describing a product as "patented," "exclusive," and "proprietary" is not actionable under section 43(a)(1)(B) of the Lanham Act because those words do not describe "the nature, characteristics, qualities, or geographic origin" of the product.

Describing a product as "patented," "exclusive," and "proprietary" cannot lead to liability under section 43(a)(1)(B) of the Lanham Act. This section only regulates advertising that "misrepresents the nature, characteristics, qualities, or geographic origin" of a good. A statute must be interpreted "consistent with [its] ordinary meaning at the time Congress enacted [it]." *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018) (ellipses and quotations omitted). The language of the text is not to be read in isolation. The interpretation "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006). The ordinary meaning of the statutory phrase, combined with unbroken precedent interpreting that text, the statute's structure, and Congress's purpose in enacting the Lanham Act confirm that the "nature, characteristics, [or] qualities" of a good refers to its physical characteristics and functional attributes, and not to the inventorship, authorship, or status of intellectual property protection.

The ordinary meaning of the statutory phrase "nature, characteristics, [or] qualities" supports the conclusion that section 43(a)(1)(B) of the Lanham Act liability extends only to representations about intrinsic physical qualities and

functional attributes of a product.[1] The dictionary definition of "nature" from the time the False Advertisement Clause was enacted when referring to a good is "the essential character or constitution of something." Webster's New International Dictionary 1507-1508 (3d ed.1986). The essential character of a good naturally relates to its physical or functional attributes that can identify that good, not to the ideas embodied in the product. Similarly, the dictionary definition of "characteristics" is "special or identifying qualities or traits" and the definition of "qualities" is "special or distinguishing attribute[s]." Webster's New International Dictionary 376, 1858 (3d ed.1986). A "trait," "quality," or "distinguishing attribute" naturally relates to a physical or functional attribute of the good that might differentiate it from another, not an abstract .

The court in *Dastar* determined that the limited textual reading of section 43(a)(1)(A) of the Lanham Act was confirmed by the purpose and history of the Lanham Act. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 30 (2003). Similarly, this approach validates that a limited reading of section 43(a)(1)(B) is the correct one. The reasoning and policy behind *Dastar* confirms that the correct reading of "nature, characteristics, [or] qualities" in section 43(a)(1)(B) of the Lanham Act is limited to the actual physical or functional attributes of a good and not authorship of the idea behind the good. In *Dastar* the court limited the scope of

[1] The statute also covers misrepresentations about the "geographic origin" of a good. § 43(a)(1)(B). Describing a product as "patented," "exclusive," and "proprietary" is obviously not referencing the geographic origin of a good. Geographic origin refers to the particular place or region a good or service may be from, whereas "patented," "exclusive," and "proprietary" all relate to the *intellectual* origin of the good. Additionally, the statute covers misrepresentation of services as well as goods, however services are not implicated by this case and thus will not be discussed.

"origin of goods" to the producers of the tangible goods offered for sale and not "the person or entity that originated the ideas" that the good embodied or contained. *Dastar*, 539 U.S. at 31-32. The court reasoned that extending the definition further would not only "stretch the text," but also "be out of accord with the history and purpose of the Lanham Act." *Id*. They said that "[b]ecause of its inherently limited wording, § 43(a) can never be a federal 'codification' of the overall law of 'unfair competition'" *Id*. at 29 (quoting 4 J. McCarthy, Trademarks and Unfair Competition § 27:7, p. 27–14 (4th ed. 2002)) (cleaned up).[2] "To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do." *Dastar*, 539 U.S. at 37. To remain true to the "inherently limited wording" and "history and purpose" of section 43(a), the "nature, characteristics, [or] qualities" should be limited to the strict textual meaning of actual physical or functional attributes of a good and not given broad, limitless meaning.

The statutory structure of section 43(a)(1)(B) of the Lanham Act also points to this interpretation. By including "geographic origin" in addition to "nature, characteristics, [and] qualities," this term must do some additional work beyond what is already in the statute to avoid being superfluous. *See, e.g., Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788

[2] Appellants belatedly attempted to add in a Colorado Consumer Protection Act claim on October 27, 2020. ECF No. 897. The court found that this untimely attempted amendment to the complaint was Appellants "seeking 'another bite at this withering apple, even though it means at least half a year of further discovery, untold judicial resources as the parties once more file endless discovery motions, and at least another year before the case will be ready for trial.'" ECF No. 929 at 7 (quoting ECF No. 897 at 10). Accordingly, the court denied the untimely amendment. *Id*. at 14.

(2011) (noting the courts "general reluctance to treat statutory terms as surplusage" (quotation and brackets omitted)). Like the inventor of a product, geographic origin is not a physical or functional attribute of a product. That the statute separately delineated geographic origin as a category of liability infers that this non-physical, non-functional aspect is *not* included in the "nature, characteristics, [and] qualities" of a product. As the drafters did not, however, specifically include the inventor or author as a basis of liability strongly signals that these categories were not intended to be included in section 43(a)(1)(B) liability.

The legislative history of amendments to the original 1946 Lanham Act also leads to the same conclusion of what the "nature, characteristics, qualities, or geographic origin" of a good means. The predecessor clause to section 43(a) of the Lanham Act prohibits use in commerce of any "false designation of origin" or "false description or representation" of a good. 15 U.S.C. § 1125(a) (1946). In the 1988 Amendment to the Lanham Act, the verbiage of "designation of origin" remained unchanged, however, "description or representation" was modified into the more specific, and more limited, "nature, characteristics, qualities, or geographic origin" of a good. While advertising that something was "patented," "exclusive," or "proprietary" may possibly be a representation about the abstract, non-physical or functional aspects of a good, the same cannot be said about the "nature, characteristics, qualities, or geographic origin" of said good, as discussed above. Congress acted purposefully to limit what is now section 43(a)(1)(B) of the Lanham Act from the broad, catch all provision of banning any false "description or

representation" to the more targeted "nature, characteristics, qualities, or geographic origin," and so any alleged violation of this provision must be targeted to a misrepresentation about the physical characteristics and functional attributes of a good.

The meaning of section 43(a)(1)(B) of the Lanham Act has been consistently interpreted by appellate courts to exclude non-physical attributes such as the status of intellectual property protection or the inventorship of the underlying intellectual material. In *Sybersound Records, Inc. v. UAV Corp.*, the court rejected an attempt to use the False Advertisement Clause for an alleged misrepresentation about the copyrighted status of a work:

> "Following the reasoning in *Dastar*, however, to avoid overlap between the Lanham and Copyright Acts, the nature, characteristics, and qualities of karaoke recordings under the Lanham Act **are more properly construed to mean characteristics of the good itself**, such as the original song and artist of the karaoke recording, and the quality of its audio and visual effects. Construing the Lanham Act to cover misrepresentations about copyright licensing status as Sybersound urges would allow competitors engaged in the distribution of copyrightable materials to litigate the underlying copyright infringement when they have no standing to do so because they are nonexclusive licensees or third party strangers under copyright law, and we decline to do so."
>
> *Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008)

The *Sybersound* court recognized that "the nature, characteristics, and qualities" properly refer to "characteristics of the good itself" and not to "misrepresentations about copyright licensing status." *Id*. Other courts of appeal have found similarly. In *Kehoe Component Sales Inc. v. Best Lighting Products, Inc.*, the court held that "a misrepresentation about the source of the ideas embodied in a

tangible object (such as a misrepresentation about the author of a book or the designer of a widget) is not a misrepresentation about the nature, characteristics, or qualities of the object." 796 F.3d 576, 590 (6th Cir. 2015). The court held that under section 43(a)(1)(B) of the Lanham Act, a misrepresentation is only actionable if it is a misrepresentation of the "characteristics of the good itself," such as "its properties or capabilities." *Id*. (quoting *Sybersound*, 517 F.3d at 1144). Similarly, in *Baden Sports, Inc. v. Molten USA, Inc.*, relied on heavily by the court below, the court found non-actionable under section 43(a)(1)(B) of the Lanham Act representations that basketballs were "innovative." 556 F.3d 1300, 1307 (Fed. Cir. 2009). The court reasoned that in advertising that the basketballs were innovative, no "physical or functional attributes of the basketballs" were implied, and thus the misrepresentation was not of the nature, characteristics, or qualities of the basketballs. *Id*.

Two district court cases are also instructive. In *Bob Mills Furniture Co., L.L.C. v. Ashley HomeStores, Ltd.*, the court held that "misuse of the ® designation alleged here does not state a claim under Section 43(a)," as a misstatement about the trademark registration does not involved an "inherent or material quality of the product." No. CIV-17-0059-HE, 2017 WL 11144629, at *2 (W.D. Okla. July 25, 2017) (unpublished) (quoting *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 62-63 (2d Cir. 2016)). In doing so, the court reasoned that "[a] focus on the inherent nature of the product or service is also suggested by the pertinent language of the Act," which only targets misrepresentations of the "origin, sponsorship or approval" or

the "nature, characteristics, qualities, or geographic origin" of the goods or services *Id*. (quoting 15 U.S.C. § 1125(a)(1)(A), (B)). Similarly, *Classic Liquor Importers, Ltd. V. Spirits International B.V.* found that for a misrepresentation to be actionable under the Lanham Act, it must relate to "an inherent quality or characteristic of the product." 201 F. Supp. 3d 428, 451 (S.D.N.Y. 2016) (quoting *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d. Cir. 1997)). The court found the misuse of the registered trademark symbol "in no way relates to an inherent quality or characteristic of" the product and so was not actionable under Section 43(a). *Id*. (quotations omitted).

Much of the core of the holding in *Dastar* would be undermined if a party was allowed to mask a claim about the authorship of a good, and instead argue it is a claim about the "nature, characteristics, [or] qualities" through artful pleading. Take *Dastar* itself: were this court to hold a claim would be brought under subparagraph (B) as a "nature, characteristics, [or] qualities," the plaintiffs could have simply plead that the defendants were misrepresenting that the show was "exclusive" or "superior" by passing it off as their own. The argument would go that the implication of holding the television series out as their own was that other competing products, such as those that the plaintiff in *Dastar* had rights over, were inferior. In effect, this would allow a party to disguise nearly any claim to one that can circumvent the holding of *Dastar* without actually changing the substance of that claim. *See Dastar*, 539 U.S. at 27-28. For this very reason, the court in Baden rejected "an attempt to avoid the holding in *Dastar* by framing a claim based on

false attribution of authorship as a misrepresentation of the nature, characteristics, and qualities of a good." *Baden Sports, Inc.*, 556 F.3d at 1307.

It is easy to see why *Dastar* found Section 43(a) of the Lanham Act to be limited in this way. Allowing the use of the Lanham Act for claims of inventorship or ownership of an idea would circumvent other regimes meant to regulate these areas, such as the Patent Act, the Copyright Act, and various state false advertising regimes (such as the Colorado Consumer Protection Act, under which Appellants' unsuccessfully tried to bring a claim (*see supra* note 2)), and would broaden the Lanham Act to encompass areas Congress did not intend. Congress specifically limited the reach of section 43(a)(1)(B) of the Lanham Act to misrepresenting "the nature, characteristics, qualities, or geographic origin" of a good. This provision is not a catch-all for any false advertising. Instead, Section 43(a) acts as a targeted regulation, consistent with the greater purpose of the Lanham Act, which is to make "actionable the deceptive and misleading use of marks," and "to protect persons engaged in ... commerce against unfair competition." 15 U.S.C. § 1127. As such, Appellants' claims are based on non-actionable advertisements outside of the four corners of section 43(a)(1)(B) of the Lanham Act, and the judgment below should be affirmed.

Writing Sample for Samuel Ezra Sokolsky

The following is an asylum brief, redacted to remove all client information. This work is used with the permission of Samuel Sokolsky's former employer and represents a complete draft of the brief without substantial editing by anyone else.

XX XX, XXXX

U.S. Citizenship and Immigration Services
San Francisco Asylum Office
P.O. Box 77530
San Francisco, CA 94107

RE: CLIENT
Supplemental Materials for I-589, Application for Asylum and Withholding of Removal

Dear Asylum Officer:

Our office represents CLIENT in his immigration matters on a *pro bono* basis. CLIENT's submits this brief in support of his request for asylum pursuant to INA § 208, 8 U.S.C. §1158.

I. Case Summary

To be eligible for asylum, an alien must show that he meets the definition of a refugee. 8 C.F.R. § 208.13(a). Under INA § 101 (a)(42)(A), a refugee is an alien "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

CLIENT is a 27-year-old native and citizen of Zimbabwe. In Zimbabwe, CLIENT experienced persecution in the form of targeted violence due to his political opinion. He also experienced discrimination and structural barriers that threatened his life because of his disability. After arriving to the United States, CLIENT came out as bisexual, an LGBTQ+ identity.

CLIENT has a well-founded fear of persecution based on his actual and imputed political opinion, and his membership in the following particular social groups: "*Person who's family members participate in opposition politics*," "*Son of father who is member of political opposition groups*," "*Brother of member of political opposition group*," "*Zimbabwean with a disability/ Zimbabwean male with a disability*," "*Zimbabwean who identifies as LGBTQ+"* "*Zimbabwean male who is bisexual*," and "*Zimbabwean who's gender presentation differs from societal norms.*"

II. Statement of Facts[1]

CLIENT was born on DATE, 1993 and grew up in Chitungwiza, Zimbabwe. He lived with his mom, dad, and sisters in his early childhood. His father remarried and when he was around 3 years old. CLIENT's father had been physically and emotionally abusive to his mother. CLIENT's mother died of spinal tuberculosis when he was four years old. After her death, his brother and sisters were his main caretakers. His housing was often in flux. At times there were nine people or more living in their small house.

After having spent minimal time with his father, CLIENT started visiting his father in Wedza when he was 8. During this period, his father and his stepmother were emotionally and physically abusive to him. His father would hit both him and his stepmother. Once, CLIENT's father broke his nose for playing soccer when he wasn't supposed to. CLIENT's stepmother often withheld food from him, His sister eventually noticed the abuse and took him back to Chitungwiza. Despite the abuse, CLIENT still had to return to visit with his abusive father.

In May 2008, CLIENT was visiting his father in Wedza. It was immediately after the presidential elections where the opposition party had won, but then the ruling party announced that there would be a runoff election. The country was violent leading up to the runoff elections. The military and other pro government forces were targeting those suspected of supporting the opposition, especially in the rural areas like Wedza. CLIENT's father was a known member of the opposition and had already been threatened.

While CLIENT was playing soccer with friends, four men came up, two of whom CLIENT had seen in the past. The two men CLIENT recognized were well known to be supporters of Zanu-PF (the dominant political party), and CLIENT had previously witnessed them warning his father not to support the opposition. The others were outsiders, and CLIENT's father later discovered were sent in by the ruling military junta to intimidate any opposition in the leadup to the runoffs. When CLIENT asked why they were all coming towards him, one told the others who CLIENT's father was, and mentioned that CLIENT's father was a supporter of MDC (Movement for Democratic Change, the opposition party) and had been urging people to vote. One of the men kicked CLIENT hard in the knee, taking him to the ground. When he struggled to get up, they struck him down.

CLIENT knew his life was at risk, as while the men may have wanted to avoid directly attacking his father, a well-known figure in town, they could send a message to his father by

[1] Relevant facts are from CLIENT's Declaration, submitted as Exhibit B, unless otherwise indicated.

harming or killing CLIENT. CLIENT struggled with the men and managed to break free and run away, with the men chasing him. As he ran, he fell in a deep, abandoned ditch from construction. The men caught up and saw him trapped in this ditch, injured and unable to escape. The men laughed at him and then left. CLIENT was unable to get out and spent hours at the bottom, unsure if anyone would find him or if he would die trapped in the hole, before his friends were able to locate him. With their help, he was able to get out and make it home.

After he was freed from the ditch, CLIENT knew he was in extreme danger and told his father that he had to leave Wedza as he feared what else might happen. CLIENT left that day, while father stayed in the Wedza area for several more months, before he too had to flee because of the political violence. Both his father's businesses were destroyed, and all the inventory was stolen.

As a result of the attack, CLIENT had a severe knee injury. His family had no money and so he was not able to get any immediate medical treatment. His knee pain got progressively worse as his ability to walk deteriorated. Around October 2008, a school administrator noticed his injury and arranged for him to be taken directly to a hospital where the administrator had connections. The doctor at the hospital, Dr. Makoni, saw a concerning shadow on the x-ray taken and admitted him to the hospital for about six weeks. CLIENT was unable to get the necessary procedures because his family did not have the money, and so he was eventually discharged. At the time, his family was barely surviving with little food, and with no adult presence in the house. His adult sister had gone to South Africa to work and send back money. In January of 2009, they were finally able to save up the equivalent of $150 USD and CLIENT was readmitted to the hospital under Dr. Makoni's care, however with no money for private procedures nothing changed.

In February of 2009, CLIENT was still unable to walk without crutches, had extreme swelling, and was unable to straighten his leg. His father took him to a new doctor in Harare named Dr. Milos Corcic who was supposed to be one of the best orthopedic surgeons in Zimbabwe. Dr. Milos Corcic recommended a CT scan, but it took several months to gather the money for the scan. After getting the scan, Dr. Milos connected them to an organization called Counseling Services that supported victims of political violence, and they were able to pay for a needed biopsy. After a month wait, the doctor told him he had bone cancer, Osteosarcoma, that was caused by necrosis of knee from when he was attacked. The doctor explained he needed an amputation or else he would likely die, and then chemotherapy after that.

After his leg was amputated, he received several rounds of chemotherapy. The doctor prescribed six rounds, but he was only able to receive two rounds after the organizations supporting CLIENT pre-amputation stopped paying for the continued treatment. After the

treatment, CLIENT requires yearly scans and other medical attention to make sure the cancer stays in remission. However, in Zimbabwe his access to care has been incredibly limited. His lack of ability to access proper treatment in Zimbabwe is in large part due to the systematic denial of basic human rights, such as healthcare, to disabled people who are viewed as lessor in Zimbabwean society.

CLIENT returned to school after his amputation, but was in a difficult place. He experienced structural barriers due to inadequacies in Zimbabwe of systems set in place for disable people, and prejudiced attitudes about disabled people. The school required CLIENT to redo his form 3 and 4 years in school due to his time in the hospital. When returning to school, the teachers denied his ambitions to continue to study agriculture. The teacher publicly admonished him for his desire to continue studying a subject they perceived him to be useless at with his disability. Even among close community members, CLIENT and his family were told that his continued education was a waste a time for a "legless person."

As a result of his circumstances, CLIENT became more politically aware and involved in different activist movements in the country, as well as the MDC. He was elected to Junior Parliament in Zimbabwe as a Senator, and then received a position as a minister. He applied for the United States Student Achiever's where the U.S. embassy advised low-income students on getting scholarships to go to universities in the United States. He was accepted into the Maseka Foundations Scholars Program and admitted to UC Berkeley, where he graduated in May 2020.

During CLIENT's sophomore year of university, he returned to Zimbabwe to renew his visa. His family warned him not to visit his father as most parts of Zimbabwe, including that region, were heavily controlled by pro Zanu-PF factions. His status as a student in the U.S., the past political violence against him, and his disability would all make him a target. CLIENT knew another attack would likely be fatal. This was his last time in Zimbabwe, as he fears persecution over his being disabled, his political opinion, and his newly discovered sexual identity.

CLIENT began to discover he was "attracted to not just certain types of bodies but instead individuals" while in school taking classes in disability studies and gender studies. **Exhibit** B: CLIENT Declaration ⁋ 38. This realization began to take place after living in a co-op for 6 weeks in 2015. At the time, he did not understand what it meant and felt the need to suppress these feelings. Later, he moved back to the co-op, and was able to speak to people who openly identified as LGBTQ+ and made meaningful romantic connections for the first time. CLIENT is bisexual, and he states that: "I am attracted to all types of people, not a specific body type or gender or sexuality. What I am attracted to is a person and their ideas." *Id* at ⁋ 43. His discovery has not been static, but rather is an "evolving identity" as he figures out who he is.

This has led him to his current relationship with someone who identifies as nonbinary and uses they/them pronouns.

CLIENT lives in deep fear of his identity causing harm to himself and his family. He is open about his sexuality with only a handful of people, and only a single person in Zimbabwe. He has kept his sexuality a deep secret from all his fellow students in the international program, especially his fellow Zimbabweans, as he knows even someone finding out here in the United States could cause violence to his family in Zimbabwe and himself.

CLIENT is afraid to return to Zimbabwe because of his sexuality. He has seen the few out non-heterosexual people in the media and how they eventually all must flee the country. Even people he knew did not fit exactly into the norm of masculine heterosexuality were ostracized. His decision to apply for asylum was motivated in large part by seeing the reaction to the former deputy headmaster of a privileged school in Harare, and how he was forced out of the school when he was discovered to be gay and forced to flee the country. After this, CLIENT knew that even the more affluent and progressive areas of the country were not safe for him, let alone the poorer and more rural areas where CLIENT is from.

CLIENT's fear of persecution from his sexual orientation is combined with his fear of persecution as someone with a disability, and his opposition political opinions. He states that there is "there is nowhere in Zimbabwe where I would be safe." *Id* at ⁋ 52. CLIENT has worked hard to build a successful life in the United States and has been able to access healthcare for his disability and to express his political opinions and his sexual orientation without the danger of persecution and death that follows him in Zimbabwe.

III. ARGUMENT

A. CLIENT has Suffered from Past Persecution

Persecution covers a wide range of actions, and "[t]he determination that actions rise to the level of persecution is very fact-dependent." *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000). An applicant for asylum must establish that the persecution was on account of "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42), *see also Navas v. INS,* 217 F.3d 646, 655–56 (9th Cir. 2000). Persecution is defined as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Matter of Acosta*, 19 I&N Dec. 211, 223 (BIA 1985). This definition contemplates harm or suffering inflicted upon an individual to punish them for possessing a belief or characteristic the persecutor seeks to overcome. *See id*.

Upon establishment of past persecution, "a rebuttable presumption of a well-founded fear arises, 8 C.F.R. § 208.13(b)(1), and the burden shifts to the government to demonstrate that there

has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (internal quotation marks omitted). A finding of past persecution can lead to a grant of asylum in two ways: either the past persecution can create the presumption of a well-founded fear of future persecution **or** if the persecution is severe enough, it can create merit asylum even without a well-founded fear of future persecution. An individual's "well-founded fear' . . . can only be given concrete meaning through a process of case-by-case adjudication." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

Persecution is defined as "an extreme concept . . . [characterized by] the infliction of suffering or harm." *Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018). Physical violence is consistently considered harm rising to the level of persecution. *See Chand v. INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000); *see also Kaur v. Wilkinson*, 986 F.3d 1216 (9th Cir. 2021) ("The hallmarks of persecutory conduct include, but are not limited to, the violation of bodily integrity and bodily autonomy.").

The cumulative effect of harms that each individually considered may not amount to persecution can be considered to find that persecution exists. *See Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998). These harms can be a mix of physical abuse, emotional harm, and threats of violence. *See id.* (finding that the cumulative effects of a Ukrainian Jew witnessing violent attacks, and suffering from extortion, harassment, and threats by anti-Semites rose to the level of persecution).

Consideration of age is an important factor when determining if the applicant has suffered from conduct that amounts to persecution. *See Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) ("Age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution."); *see also* U.S. Dep't of Justice, *Guidelines for Children's Asylum Claims*, 1998 WL 34032561 (1998) (stating that harm suffered by a child "may be relatively less than that of an adult and still qualify as persecution.").

CLIENT has shown that he has suffered past persecution as he was targeted and attacked by four men when he was just a child, resulting in bone cancer and the loss of his leg. The resulting disability from this attack has made him especially vulnerable to future attacks. CLIENT additionally suffered past persecution at the hands of systems in Zimbabwe that actively disenfranchise people with disabilities. This includes a medical system that almost cost him his life, a discriminatory education system, and exclusion from opportunities available to others.

When CLIENT was 14, he was targeted and attacked by four grown men, who recognized CLIENT as the son of someone organizing for democracy. Two of the men were locals who had previously threatened CLIENT's dad not to support the opposition, and two were outsiders brought in stifle the opposition. The four men called out to him, and said they were there because of his father's political actions. One of the men kicked CLIENT hard in the knee, causing CLIENT to fall to the ground and incapacitating him. They continued to beat him down with blows to the face and body. CLIENT was able to break free and run away. The four men chased after him. As he fled, CLIENT fell into a deep, open ditch. The men, seeing CLIENT trapped, injured, and unable to escape, laughed and left him for dead. CLIENT was rescued hours later by friends who helped pull him out. As a direct result of the assault on his knee and the fall afterward, he developed bone cancer and ultimately had to have his leg amputated. CLIENT's father reported the assault on CLIENT to the police, and it was dismissed as trivial and "boys being boys," even though the crime was perpetrated by four grown men who expressly stated they were assaulting CLIENT for his family's political views.

This was not the first time that CLIENT's family suffered for being MDC supporters. In 2001, when CLIENT was only eight, his half-brother and their family had to flee their home and move in with CLIENT due to the violence targeting those organizing for MDC perpetrated by the ruling party. After CLIENT was attacked, his father also had to flee Wedza and lost his two small businesses.

After his injury, his treatment at the hands Zimbabwe's medical system also amounts to persecution. Medical providers denied CLIENT treatment over and over before he finally received medical attention. It was discovered he had bone cancer from the injury and needed to have his leg amputated. CLIENT also experienced diminished care and his medical needs were particularly neglected after his amputation due to the perception that it would be a waste of resources to give medical attention to a person with a disability. CLIENT did not receive a single session of physical therapy after having his leg amputated, and only got two of six rounds of chemotherapy prescribed. Not a single doctor checked on his progress while receiving chemotherapy.

CLIENT's inability to receive proper healthcare while having a disability is far from an isolated incident. The Zimbabwe Human Rights NGO Forum reports that "PWDs [People with disabilities] are one of Zimbabwe's most marginalized groups." **Exhibit L:** The Zimbabwe Human Rights Ngo Forum, The State of Human Rights Report Zimbabwe 2017. They further state that, "[people with disabilities] suffer from widespread violation of their fundamental freedoms and rights. They face exclusion from education, employment, cultural activities, festivals, sports and social events and are especially vulnerable to poverty, physical and sexual violence, lack of access to health care, emotional abuse and neglect." *Id*. This matches CLIENT's

experience, as he faced an inaccessible education system that did not allow him to pursue his chosen area of study based on the perception he had no future in agriculture due to his disability. CLIENT was not able to participate in opportunities available to other students because his school had no infrastructure that was accessible to him. As a result of the trauma of the attack and grappling with having a disability, he suffered heavily from depression and body image issues, and there was no support systems or mental health services available to him.

The attack CLIENT suffered in Zimbabwe, the denial of lifesaving medical treatment, and the systematic discrimination faced by those with disabilities all amounts to persecution, when taken individually and taken in the aggregate. *See Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (finding the "totality of the circumstances" of different types of harm amounted to persecution). CLIENT must deal with the ongoing trauma of these past experiences and is permanently disabled as the result of the loss of his leg. CLIENT is entitled to a finding of past persecution and a presumption of well-founded fear of future persecution.

B. CLIENT has a Well-Founded Fear of Future Persecution

CLIENT has a well-founded fear of future persecution based on his sexual orientation, his disability, and his political opinion. Past persecution entitles an applicant to a rebuttable presumption of future persecution. 8 C.F.R. § 208.13. Even if an applicant has not established past persecution, they may "establish a well-founded fear of future persecution by showing both a subjective fear of future persecution, as well as an objectively 'reasonable possibility' of persecution upon return to the country in question." *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1029 (9th Cir. 2019), *see* also *Parada v. Sessions*, 902 F.3d 901, 909 (9th Cir. 2018) and *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam).

Here, CLIENT has a well-founded fear of future persecution. Zanu-PF, the ruling party at the time of his assault, is still in control. The U.S. State Department found that "[d]espite incremental improvements," much of the irregularities in the political process that lead to CLIENT's assault and subsequent amputation still exist. **Exhibit K**: U.S. Department of State Zimbabwe 2020 Human Rights Report. The report notes some of the gross abuses of human rights that persist in Zimbabwe, including "unlawful or arbitrary killings of civilians by security forces; torture and arbitrary detention by security forces; cases of cruel, inhuman, or degrading treatment or punishment; harsh and life-threatening prison conditions; political prisoners or detainees." *Id*. The report also noted a potential "extrajudicial killing of Movement for Democratic Change-Alliance councilor Lavender Chiwaya" and that "[i]mpunity for politically motivated violence remained a problem." *Id*.

The same human rights violations from the previous regime persist under the new Zanu-PF president. Human Rights Watch reports on the "broken promises" under President Emmerson Mnangagwa: "[a]lthough President Mnangagwa has repeatedly voiced a commitment to human rights reforms, his administration in fact remains highly intolerant of basic rights, peaceful dissent, and free expression." **Exhibit EE**: Mnangagwa's Broken Human Rights Promises Two Years On, Human Rights Watch, Sept. 4, 2020. Recently, the police are suspected to have abducted, tortured, and sexually assault three female members of the MDC after they were stopped at a police checkpoint. **Exhibit LL:** Zimbabwe: UN experts demand an immediate end to abductions and torture, Office of the United Nations High Commissioner for Human Rights, June 10, 2020. This led to UN human rights experts calling an end for the "reported pattern of disappearances and torture that appear aimed at suppressing protests and dissent." *Id*.

The conditions that existed when CLIENT was assaulted persist to this day and nothing rebuts the presumption that his past persecution leads him to have a well-founded fear of future persecution. Far from stabilizing, the political volatility in Zimbabwe has only worsened, leading to BBC News reporting a story questioning if Zimbabwe was once again spiraling into chaos and destabilization. **Exhibit GG**: Zimbabwe - once more on the brink of collapse?, BBC NEWS, June 17, 2020.

Additionally, CLIENT has a well-founded fear of future persecution based on his sexuality. CLIENT has discovered that he is bisexual since coming to United States. LGBTQ+ people in Zimbabwe face incredibly high rates of violence. A report released by GALZ, Zimbabwe's LGBTI rights group, found that 50% of the LGBTI community reported acts of violence against them. *See* **Exhibit N**: *Report Shows Half of Gay Population Subjected to Assault in Zimbabwe*, Gay Nation, Jul. 30, 2018. A Human Rights group, Zimrights, found 760 reports of attacks on homosexual university students in 2018. *See* **Exhibit O**: *Zimbabwe no safe haven for Homosexuals*, News Day, Nov. 21, 2019. The leader of GALZ, Chesterfield Samba, stated that "suspected gay students are being tracked down by their anti-gay colleagues in clubs, bars and even in their homes. They are openly harassed, assaulted or even killed." *Id*.

Zimbabwe has archaic laws regarding same sex relationships and has demonstrated a lack of protection for LGBTQ people. The Voice of America reported that Zimbabwe is "one of the least accepting countries in the world for gay, lesbian and transgender people." **Exhibit O**: *Gay Zimbabweans Fight Stigma, Harsh Laws*, Voice of America, Jan. 12, 2017. Zimbabwe's constitution expressly bans people of the same sex from marrying each other, and its criminal code criminalizes sodomy with up to a year in jail. **Exhibit I**: *Zimbabwe's Constitution of 2013*; **Exhibit J**: Criminal Law (Codification and Reform) Act 2005. Additionally, criminal code defines sodomy as any physical act that would be "regarded by a reasonable person to be an

indecent act," leaving the possibility that even same sex men holding hands or kissing could be criminalized under this code. *Id*.

Authorities use other laws and processes to persecute LGBTQ+ people. The United Kingdom Home Office Report found that "[t]he authorities are also reported to commonly harass LGBT persons on the grounds of loitering, indecency and public order offences. *See* **Exhibit M**: United Kingdom Home Office, Country Policy and Information Note Zimbabwe: Sexual Orientation and Gender Identity. Additionally, there are reports of arbitrary detention, ill-treatment, and police extortion and intimidation. *Id*.

CLIENT's sexuality is especially visible due to his not following typical gender norms of Zimbabwe. Zimbabwe has a narrow range for accepted presentation of masculinity. Zimbabwean society "lauds and uplifts one kind of masculinity while disregarding any other." *See* **Exhibit Z**: *In Zimbabwe, Toxic Masculinity is Driving Male Suicide Rates, Newsweek,* March 17, 2021 CLIENT's gender presentation and actions do not follow those typically accepted for Zimbabwean males. His gender presentation makes his sexual identity more readily apparent in Zimbabwe. In Zimbabwe, community members will target someone rumored to be homosexual if their appearance or behavior of it doesn't align with the prototypical masculinity expected of Zimbabwean men, even without evidence that the individual is engaged in same sex activities. **Exhibit B**, CLIENT Declaration ⁋ 44. CLIENT's gender presentation puts him at an enhanced risk of future persecution from his sexual identity.

CLIENT has a well-founded fear of future persecution. The political conditions and lack of accessibility that led to his past persecution have persisted since he left the country. Additionally, he has a well-founded fear of future persecution based on his sexual identity as a bisexual man.

C. CLIENT Merits a Grant of Humanitarian Asylum

CLIENT merits humanitarian asylum. An applicant for asylum who has established past persecution is eligible for humanitarian asylum, even in the absence of a well-founded fear of future persecution, if the applicant can "establish[] that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 1208.13(b)(1)(iii); *see also Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012). The relevant "other serious harm" need not be inflicted on account of a protected ground and can be "wholly unrelated to the past harm," though it must rise to the level of persecution. *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012). Relevant country conditions information "may include, but are not limited to, those involving civil strife, extreme economic deprivation beyond economic disadvantage, or

situations where the claimant could experience severe mental or emotional harm or physical injury." *Id.*

CLIENT faces a reasonable possibility of other serious harm because of his political opinion, sexual orientation, and his disability. Should he return to Zimbabwe, he would be again face discrimination based on his disability preventing him from accessing needed healthcare, such as his required yearly scans to make sure his cancer stays in remission. Country conditions in Zimbabwe are as unstable as ever, further amplifying any harm CLIENT might suffer of behalf of his disability, political opinion, or sexual orientation. **Exhibit GG**: Zimbabwe - once more on the brink of collapse?, BBC NEWS, June 17, 2020. The economic conditions of a destabilizing Zimbabwe, where only 7% of people with disabilities were employed, rise to the level of "extreme economic deprivation." *See* **Exhibit BB**: *Disabled persons — discrimination, remedies*, Newsday, Oct. 22, 2016; *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012). Even absent a finding of future persecution, CLIENT merits a grant of humanitarian asylum.

D. Protected Grounds

An applicant for asylum must show that they have experienced past persecution or have a well-founded fear of future persecution on account of a protected ground. 8 U.S.C. § 1101(a)(42)(A). The five protected grounds are race, religion, nationality, political opinion or membership in a particular social group. *Id*. The applicant must also demonstrate that the persecution has a nexus to the protected ground. *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010). The protected ground need not be the sole reason for the past or well-founded fear of future persecution, but it must be "at least one central reason" for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). The Ninth Circuit explains that while "persecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant." *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009).

To prove the nexus between the protected ground and the persecution, the applicant may rely on direct or circumstantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). Statements made by the perpetrator to the victim can constitute direct evidence of the motivation for the persecution. *See Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004). Circumstantial evidence to prove that persecution was on account of protected grounds can be shown by either proving that the perpetrator has harmed other people in the same protected group, or with country conditions evidence. *See* U.S. Citizenship and Immig. Serv., Raio Directorate – Officer Training: Nexus and the Protected Grounds 20 (2012).

i. Particular Social groups

The Immigration and Nationality Act is silent on the definition of a "particular social group." 8 U.S.C. § 1101(a)(42)(A). Caselaw explains that a particular social group is one where "a group of persons all of whom share a common, immutable characteristic . . . that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). The particular social group can be based on both something innate or a voluntary association. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000). A particular social group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014)." Social distinction does not depend on "on-sight" visibility, but rather perception of society. *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc), *see also Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 240 (BIA 2014). For a group to have the particularity to constitute a particular social group, the group must share common characteristics that would "provide a clear benchmark for determining who falls within the group." *M-E-V-G-*, 26 I. & N. Dec. at 239 (BIA 2014); *see also Henriquez-Rivas*, 707 F.3d at 1091.

CLIENT qualifies for asylum based on his membership in the following social groups: "*Person whose family members participate in opposition politics*," "*Son of father who is member of political opposition groups*," "*Brother of member of political opposition group*," "*Zimbabwean with a disability/Zimbabwean male with a disability*," "*Zimbabwean who identifies as LGBTQ+"* "*Zimbabwean male who is bisexual*," and "*Zimbabwean whose gender presentation differs from societal norms.*"

> *a.* "*Person whose family members participate in opposition politics*," "*Son of father who is member of political opposition groups*," "*Brother of member of political opposition group*"

CLIENT is a member of the particular social groups of "*Person whose family members participate in opposition politics*," "*Son of father who is member of political opposition groups*," and "*Brother of member of political opposition group*." CLIENT's family supports the opposition party MDC in a country dominated since its independence by the Zanu-PF. Pro-government forces have targeted CLIENT because of his family's activism in a country ruled by leaders willing to ruthlessly put down dissidents.

The Ninth Circuit has held that the family is a common particular social group under the framework in *Matter of M-E-V-G-*. *See Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015); *see also Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (the immediate family is the "prototypical" particular social group). Political affiliation can particularly tie families together

as a particular social group, as "[i]t is true that for kinship ties to be 'recognizable and discrete' such that 'would-be persecutors could identify [individuals] as members of the purported group,' those ties often will be linked to race, religion, or political affiliation." *Thomas v. Gonzales*, 409 F.3d 1177, 1188 (9th Cir. 2005), *quoting Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

In the *Matter of L-E-A-*, the Attorney General held that family based particular social groups need to fit within the *M-E-V-G-* framework. 27 I&N Dec. 581 (A.G. 2019). While that narrow holding is consistent with prior Ninth Circuit holdings, to the extent that dicta in *Matter of L-E-A-*, stating that "most nuclear families are not inherently socially distinct," conflicts with the above Ninth Circuit holdings, the Ninth Circuit should be deemed controlling. *Matter of L-E-A-*, 27 I&N Dec. 581, 589 (A.G. 2019). However, even within the framework laid out in the dicta of *Matter of L-E-A-* which expressly stated that the case "does not bar all family-based social groups from qualifying for asylum", CLIENT's particular social groups based on his familial relationships are still cognizable. *Matter of L-E-A-*, 27 I&N Dec. 581, 586 (A.G. 2019). As with all asylum claims based on particular social groups, the adjudicator still must make a case-by-case determination of the requirements for a particular social group laid out in *Matter of M-E-V-G-*. *See generally* 26 I&N Dec. 227 (BIA 2014).

CLIENT's family has been active supporters of MDC throughout his life. His family's political activism was an important part of CLIENT's childhood. His family, especially his dad and brothers, taught him from a young age of the problems facing Zimbabwe and how the best answer was in opposition politics. His family was constantly participating in political activities, and the government and its supporters targeted his different family members across different areas of the country because of their political opinion. CLIENT and his father had a difficult relationship; however, it was in listening to his father and his friends discuss politics and organizing for MDC where CLIENT respected his father the most.

Nexus exists between CLIENT's familial relationships and the past persecution he has suffered. He was specifically targeted because of familial relationships, with the expectation that harming CLIENT would punish and chill the political speech and actions of his family members. When attacking CLIENT, they specifically mentioned both his father and his father's political activities (getting people to vote and support MDC). The perpetrators were able to single out and choose to carry out this attack on CLIENT because his family unit was a perceivable social group to them, and so they knew that harming one member of the group would harm them all.

b. "*Zimbabwean with a disability*/*Zimbabwean male with a disability*"

CLIENT belongs to the particular social groups of "*Zimbabwean with a disability*/*Zimbabwean male with a disability*." The Ninth Circuit has held that disability can be a

cognizable particular social group. *See Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1184 (9th Cir. 2005), *vacated on other grounds* by 549 U.S. 801 (2006) (holding that "Russian children with disabilities that are serious and long-lasting or permanent in nature" consists of a particular social group).

Having a disability is a clearly cognizable particular social group in Zimbabwean society. The Zimbabwean Human Rights NGO Forum has held that people with disabilities are "one of Zimbabwe's most marginalized groups" and that they face shared violations of rights. *See* **Exhibit L**: The Zimbabwe Human Rights Ngo Forum, The State of Human Rights Report Zimbabwe 2017. This group is immutable in the most literal sense of the word, as disabilities are generally permanent medical conditions. The group is socially distinct as the group is both optically visible and perceived by society as different. *See* **Exhibit K**: U.S. Department of the State, *Zimbabwe 2020 Human Rights Report*. (In Zimbabwe, "the public considered persons with disabilities to be objects of pity rather than persons with rights.") The group is defined with particularity, as it consists of the limited set of people who consider themselves as having a disability.

CLIENT lost his leg from amputation when he was a teenager and has used either crutches or a prosthetic ever since. He is identified by others as being a Zimbabwean with a disability: strangers on the street will offer to bring him to their churches to "heal" him, teachers have singled him out to tell him what he can and cannot study, and friends treated him different. He also self identifies as part of this group. As a minister in Junior Parliament he was vocal about the systematic challenges of having a disability.

CLIENT's past persecution has a nexus to his membership in the particular social group of Zimbabweans with disabilities. He experienced the structural persecution built into Zimbabwean's institutions: grossly inadequate healthcare, discrimination in the education system, and infrastructure and transportation systems that are built to the exclusion of people with disabilities. Additionally, Zimbabwean society specifically targets people with disabilities, partially due to "[m]ost persons holding traditional beliefs viewed persons with disabilities as bewitched." *See* **Exhibit K**: U.S. Department of the State, *Zimbabwe 2020 Human Rights Report*.

c. "*Zimbabwean who identifies as LGBTQ+"* "*Zimbabwean male who is bisexual*"

CLIENT has a well-founded fear of future persecution based on his particular social groups of "*Zimbabwean who identifies as LGBTQ+"* and "*Zimbabwean male who is bisexual*." It is well established that sexual orientation constitutes membership in a particular social group.

See Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1994); *see also Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that all noncitizen homosexuals are members of a "particular social group."). Sexual orientation based particular social groups meet the immutability requirement, as one's sexual orientation is a characteristic so fundamental to one's identity that the members cannot or should not be able to change. *See Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000); *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) (holding that "*all* alien homosexuals are members of a 'particular social group'") (emphasis original).

They also meet the requirements of "social distinction" and "particularity." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 236-37 (BIA 2014). LGBTQ+ and bisexuality are defined with particularity, as they are identity based particular social groups based on a person's innate sexuality. Sexual orientation based particular social groups are also socially distinct. Those that are attracted to and have relationships with people of different genders "are set apart, or distinct, from other persons within the society in some significant way." *Id*. at 238.

As someone who identifies as bisexual, CLIENT belongs to these particular social groups as he is attracted to people of all identities, regardless of their gender or sex. He is currently in a relationship with someone who identifies as nonbinary and has previously had same-sex encounters.

CLIENT would face persecution as a direct result of his sexuality. Zimbabwe is one of the least accepting and most dangerous countries for LGBTQ+ persons, with laws criminalizing same sex conduct, the constitution specifically banning same sex marriage, and widespread violence and harassment perpetrated against people viewed as LGBTQ+. *See* **Exhibits M-Y**. A report from the country's sole LGBTI rights group found that "50% of the population [LGBTI people] report[ed] acts of violence against them." **Exhibit U**: *Report Shows Half Of Gay Population Subjected To Assault In Zimbabwe*, Gay Nation, Jul. 30, 2018. The report found that this population faced "assault, threats, outing, discrimination, police harassment, unlawful detention, disownment, blackmail, displacement, unfair labour practice, hate speech, and invasion of privacy." *Id*. This is no surprise from a country where the former leader described gay people as "un-African" and "worse than pigs and dogs." *See* **Exhibit V**: *Worse than dogs and pigs: life as a gay man in Zimbabwe*, Reuters, Sept. 3, 2017. LGBTQ+ Zimbabweans in similar situations to CLIENT are explicitly persecuted solely on behalf of their status as an LGBTQ+ person. If returned to Zimbabwe, CLIENT would suffer from future persecution as a result of his LGBTQ+ status.

d. "*Zimbabweans whose gender presentation differs from societal norms*"

CLIENT belongs to the particular social group of "*Zimbabweans whose gender presentation differs from societal norms*." In CLIENT's case, his presentation differs from what is expected of Zimbabwean masculinity in ways that would increase his visibility and be targeted for if returned to Zimbabwe.

The group has social visibility, as it is defined by societies perception of someone based on their outwardly visible expressions. The Ninth Circuit has held that "transgender persons are often especially visible, and vulnerable, to harassment and persecution due to their often public nonconformance with normative gender roles" *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015). While someone who's gender presentation differs from norms is different than someone who is transgender, the same aspect of increased visibility of nonconformance with normative gender roles leading to heightened harassment and persecution similarly applies. Someone's gender presentation is immutable, as that expression is an extension of their being. Lastly, it is defined with particularity as it is a limited set of people who do not follow societal expectations of "masculinity".

CLIENT views his gender presentation differing in several ways from what is expected of Zimbabwean males. His outward appearance differs, as he has dyed hair and wears tight fitting clothing, which CLIENT states as going against the norms of socially conservative and religious Zimbabwe. CLIENT has only recently felt comfortable enough experimenting with his expression in a way that matches how he feels. He would not be able to express himself without fear if in Zimbabwe. Additionally, CLIENT's career choice is to do nurturing work providing support to others, and this would be work not accepted as proper for a Zimbabwean male.

If returned to Zimbabwe, CLIENT would face persecution as a direct result of his gender presentation and gender nonconformance. As stated above, LGBTQ+ people face extreme persecution and violence in Zimbabwe. Risk of persecution and violence is heightened for people whose gender presentation differs from their sex assigned at birth, as this is an immediately perceivable particular social group. If returned CLIENT would face persecution specifically because of his nonconforming gender presentation.

ii. Political Opinion

CLIENT was persecuted on his actual and imputed political opinion of supporting opposition politics to the ruling Zanu-PF political party. To show persecution on account of a political opinion, first the applicant "must show that he held (or that his persecutors believed that he held) a political opinion" and second that they were persecuted (or faces the prospect of persecution) "*because of* his political opinion." *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000).

Political opinion is defined broadly, encompassing more than simply electoral politics. *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007).

Imputed political opinion is when the "persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views." *Baghdasaryan v. Holder*, 592 F.3d 1018, 1024 n.6, 1024–25 (9th Cir. 2010). With imputed political opinion, the applicant's own beliefs are irrelevant to the analysis. *See Kumar v. Gonzales*, 444 F.3d 1043, 1054 (9th Cir. 2006). The Ninth Circuit has specifically held that an imputed political opinion can be placed on someone based on their family's political opinion. *See Silaya v. Mukasey*, 524 F.3d 1066, 1070–71 (9th Cir. 2008).

CLIENT was specifically targeted because his persecutors imputed his father's political opinion onto him. The men directly mentioned his father's membership in MDC and his work in getting people to vote when assaulting CLIENT, and circumstantially they would expect CLIENT held these same beliefs.

CLIENT also holds the same political beliefs as his father. CLIENT grew up listening and learning from his father's political organizing. His strong desire to be involved in politics inspired him to run for junior parliament and to try to make changes to a country hostile and inaccessible for people with disabilities. CLIENT has stated that it was only natural to follow his father's footsteps, and "became an MDC revolutionary like my father." **Exhibit** B: CLIENT Declaration ⁋ X. Due to the extreme political violence that persists in Zimbabwe to this day targeted at those who support MDC and support democratic reform, CLIENT has a well-founded fear of persecution on account of these beliefs. *See* **Exhibits** K, DD-NN.

E. The Government is Unwilling or Unable to Protect CLIENT from Persecution

To qualify for asylum, persecution must be by the government, a quasi-official group, or by people or groups the government is unwilling or unable to control. *See Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). Even tacit government sponsorship of persecution is enough to find that the government is responsible for the persecution. *Id*. If the government is responsible for the persecution, it is unnecessary to show that the applicant sought help from the police. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004). A lack of responsiveness by the government can also demonstrate they are unwilling or unable to control those committing the persecution, though it is not required. *Id*. In *Matter of A-B-*, the Attorney General held that the "unable or unwilling" standard to mean that the government either "condoned the behavior or demonstrated a complete helpless to protect them." However, this interpretation was held to be arbitrary and capricious and USCIS is enjoined from using it. *Grace v. Whitaker*, 344 F. Supp. 3d

96, 140 (D.D.C. 2018), *affirmed in part; vacated and remanded in part by Grace v. Barr*, 965 F.3d 883, 900 (D.C. Cir. 2020).

CLIENT's persecution came at the hands of government agents. Of the four assailants, two were known supporters of the Zanu-PF regime, and two were outsiders who specifically came to their rural town of Wedza in the period leading up to the runoff elections to stifle dissent. That these men targeted CLIENT because of his family's opposition politics and organizing provides further evidence that they were persecuting him as agents of the government.

Additionally, the four men's attack on CLIENT was one that the government was unable or unwilling to control. After CLIENT fled from the town, his father reported the matter to the police. The police dismissed the complaint offhand as "kids being kids." However, CLIENT's father reported the attack was perpetrated by four grown men on a mere child. The police's comments minimizing the attack and falsely attributing it to "kids being kids" shows a strong lack of responsiveness. This lack of responsiveness is sufficient to show the government was "unwilling or unable" to control this persecution. *See Baballah,* 367 F.3d at 1078 (9th Cir. 2004).

The persecution CLIENT suffered because of his disability came directly at the hands of government actors and government systems. The health system, education system, transportation system, and other systematic barriers in place in Zimbabwe are all government controlled and run and the lack of funding or accessibility that all entail reflect deliberate choices about what systems to fund. *See Avetovo-Elisseva*, 213 F.3d at 1198 (9th Cir. 2000).

CLIENT's well-founded fear of future persecution on behalf of his sexual orientation would also be at the hands of the government. Zimbabwe laws criminalizing same sex conduct between men, and even conduct as innocuous as holding hands could be criminalized under the statute. The police have used a pattern of unlawful and arbitrary detention, extortion, and ill treatment of LGBTQ+ people under the guise of loitering, indecency, and public order offenses. *See* **Exhibit L**: The Zimbabwe Human Rights NGO Forum, The State of Human Rights Report Zimbabwe 2017.

Additionally, the government will be unwilling to control any non-government actors who may persecute CLIENT because of his sexual orientation. Prominent government figures, including former president Robert Mugabe, have condoned and incited violence against LGBTQ+ people by calling homosexuality "unnatural," "worse than dogs and pigs," and "un-African." *See* **Exhibit U**: *Worse than dogs and pigs: life as a gay man in Zimbabwe*, Reuters, Sept. 3, 2017. With criminal penalties against same sex activity, LGBTQ+ suffering from persecution have no recourse as they are unable to seek government protection. *See* **Exhibit L:** The Zimbabwe Human Rights NGO Forum, The State of Human Rights Report Zimbabwe 2017.

F. Internal Relocation is Not Possible

Asylum is not available if "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country of nationality ... and under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(1)(i)(B). The internal relocation must be reasonable under the totality of the circumstances, with factors including "the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor." 8 C.F.R. § 1208.13(b)(3). If the persecutor is government or is government-sponsored, then it is presumed that relocation will not be reasonable. 8 C.F.R. § 1208.13(b)(1)(ii).

Relocation is presumed unreasonable because CLIENT was persecuted by government actors. Zanu-PF is the dominant party across the entirety of Zimbabwe and political violence has not let up since CLIENT left. *See* **Exhibits EE-OO**. Human Rights Watch has noted that human rights abuses committed by the government against protestors and opposition have occurred "throughout the country." *See* **Exhibit HH**: Zimbabwe: SADC, AU Should Denounce Crackdown. Dozens Arrested, Harassed for Peaceful Protests, Human Rights Watch, Aug. 6, 2020.

CLIENT will also not be able to relocate anywhere in Zimbabwe where he would not have reasonable fear of persecution because of sexual orientation. Criminalization of LGBTQ+ conduct is enshrined in the country's criminal code, and the denial of LGBTQ+ right to marry is codified in the constitution. *See* **Exhibit I**: *Zimbabwe's Constitution of 2013*; **Exhibit J**: *Criminal Law (Codification and Reform) Act* 2005. Additionally, violence, harassment, repression, harassment, unlawful detention, invasion of privacy, and marginalization of LGBTQ+ people have been seen across Zimbabwe. *See generally* **Exhibits K-Z**. CLIENT decided to pursue asylum was when he saw a popular teacher in an affluent, progressive area outed as gay and forced to quit his job and flee the country. *See* **Exhibits V, W**. After this incident, CLIENT realized that there was no area of the country where he would be safe from persecution.

CLIENT's ability to relocate reasonable is further hampered by a country that is inaccessible for people with disabilities. *See generally* **Exhibits L-DD**. As few places in Zimbabwe have accessible buildings or transportation, employment or educational opportunities, or other services designed to be accessible to people with disabilities, CLIENT will further be unable to reasonably relocate. *Id*.

Between political violence, fear of persecution due to his sexual orientation, and the general inaccessibility of Zimbabwe for people with disabilities it is unreasonable– if not impossible– for CLIENT to internally relocate.

G. CLIENT Qualifies for the Changed Circumstances Exception to the One-Year Bar

Asylum applications generally must be filed within one year of entering the country. However, the government may still consider asylum applications after if the applicant shows changed or extraordinary circumstances. *Singh v. Holder*, 656 F.3d 1047, 1052 (9th Cir. 2011). Additionally, "[t]he proposed exceptions to the one-year bar for changed circumstances … were intended to be broad." *Vahora v. Holder*, 641 F.3d 1038, 1045 (9th Cir. 2011).

After changed circumstances occur, the applicant must demonstrate that the application was filed "within a reasonable period given those 'changed circumstances.'" 8 C.F.R. § 208.4(a)(4)(ii). In finding that a delay after conversion to Christianity was reasonable for filing the asylum claim, the court accepted that a delay was reasonable as a religious conversion was not just a singular day, but rather a process that took time. See *Taslimi v. Holder*, 590 F.3d 981, 987 (9th Cir. 2010).

The Asylum Office Lesson Plan states that "coming out" can be a basis for changed circumstances. USCIS, Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Dec. 20, 2019) at 64-65. ("In many instances an individual does not feel comfortable accepting himself or herself as LGBTI until he or she is in a country where the applicant can see that it is possible to live an open life as an LGBTI person. If an individual has recently "come out" as lesbian, gay, bisexual, or transgender, this may qualify as an exception based on changed circumstances.").

Other circuits have ruled that if one shows changed or extraordinary circumstances for a single asylum claim, they may also bring forward any other claims past the one-year bar. *See Yan Yang v. Barr*, 939 F.3d 57, 59-60 (2nd Cir. 2019). While the Ninth Circuit has yet to rule on this, this holding, fits with the finding of the Ninth Circuit that congressional intention was for a "broad" exception to the one-year bar. *Vahora*, 641 F.3d at 1045 (9th Cir. 2011).

CLIENT has shown changed circumstances based on his discovery of his sexual orientation and identity. CLIENT grew up in a society where he would have faced extreme discrimination and violence had he come out. He was unable to discover his sexual orientation because of internalized repression born out of fear. *See* **Exhibit B**, CLIENT Declaration ⁋ 38. CLIENT describes a process where through exposure to new ideas and people while at UC Berkeley, he "started off being afraid of connecting with what [he] wanted, but then started getting closer with people and becoming more comfortable with [himself]." *Id.* at ⁋ 43. This process is continuously evolving as CLIENT works through fighting the internalized urge to repress his true self that was engrained in him from his upbringing in Zimbabwe. *See id. at* ⁋ 41.

CLIENT submitted his application within a reasonable period after his changed circumstance. Like the applicant in *Taslimi*, CLIENT had no singular moment when he "came out," rather, he has been undergoing a process of finding himself. *See* 590 F.3d at 987 (9th Cir. 2010). His application for asylum, filed June 8th, 2020, came only a short time after becoming more comfortable coming out to a limited number of people. As such, CLIENT qualifies for an exception to the one-year bar.

H. Discretion

Asylum requires "both the applicant first to establish his *eligibility* for asylum by demonstrating that he meets the statutory definition of a 'refugee,' and second to show that he is *entitled* to asylum as a matter of discretion." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004). There is no definitive list of factors when looking at discretion, rather, "all relevant favorable and adverse factors must be considered and weighed." *Id*. at 1139, 1140 & n.6. CLIENT merits a positive exercise of discretion. He has demonstrated he meets the eligibility for asylum. CLIENT is grateful to have gotten a degree at University of California, Berkeley and he has used his education to work for a nonprofit for the benefit of people with disabilities. He has been able to get the medical care and mental health support he needs in the United States, and he has had the freedom to discover his true self and sexual orientation. He hopes to continue his education and work with and support other individuals who are in a similar position as he is in.

IV. CONCLUSION

CLIENT meets all the elements of and is deserving of a grant of asylum. He qualifies for an exception to the one-year bar. He has suffered persecution and has a well-founded fear of persecution. For all the foregoing reasons, CLIENT respectfully request he be granted asylum.

Applicant Details

First Name	**Christian**
Last Name	**Soler**
Citizenship Status	**U. S. Citizen**
Email Address	**christiansoler93@gmail.com**
Address	**Address** Street **925 Waverley Street, Apt. 205** City **Palo Alto** State/Territory **California** Zip **94301** Country **United States**
Contact Phone Number	**281-744-4920**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2016**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 12, 2022**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kelman, Mark
mkelman@stanford.edu
(650) 723-4069
Letter, Dean's
deansletter@law.stanford.edu
650-723-4455
Meyler, Bernadette
bmeyler@law.stanford.edu
Srikantiah, Jayashri
jsrikantiah@law.stanford.edu
650-724-2442

This applicant has certified that all data entered in this profile and any application documents are true and correct.

CHRISTIAN SOLER
925 Waverley St., Apt. 205, Palo Alto, CA 94301 | (281) 744-4920 | christiansoler93@gmail.com

June 19, 2023

The Honorable P. Casey Pitts
U.S. District Court for the
Northern District of California
Robert F. Peckham Federal Building
280 S Second St.
San Jose, CA 95113

Dear Judge Pitts:

I am an alumnus of Stanford Law School, and a current associate at the firm Skadden, Arps, Slate, Meagher & Flom, writing to apply for the position of Term Law Clerk 2023 – 2024 and 2024 – 2025.

Enclosed please find my resume, references, law school transcript, and writing samples for your review. Professors Jayashri Srikantiah, Bernadette Meyler, and Mark Kelman will provide letters of recommendation in support of my application.

I look forward to the opportunity to discuss my interest in the position further. Thank you for your time and your consideration.

Best regards,

Christian Soler
(he/him)

CHRISTIAN SOLER

925 Waverley St., Apt. 205, Palo Alto, CA 94301 | (281) 744-4920 | christiansoler93@gmail.com

EDUCATION

Stanford Law School Stanford, CA.
Juris Doctor, June 2022

Honors: Judge Thelton E. Henderson Prize for Outstanding Performance in the *Immigrants' Rights Clinic*; Gerald Gunther Prize for Outstanding Performance in *Advanced Torts*; SLS Pro-Bono Distinction
Journals: *Stanford Law Review* (Volume 74: Online Publication Committee Editor; Volume 73: Member Editor); *Stanford Law & Policy Review* (Volume 31: Associate Editor)
Activities: Research Assistant for Professor Bernadette Meyler; Stanford Law Tax Pro Bono Project; Transgender, Gender-Variant & Intersex Pro Bono Project; Outlaw; Stanford Latinx Law Students Association; Stanford Law First-Generation & Low-Income Professionals

Yale University New Haven, CT.
Bachelor of Arts in English with distinction, *magna cum laude*, May 2016

Honors: The Woodbridge Fellowship (funding a one-year position in high-level university administration)
Activities: *The Yale Globalist*; *AURA: The Yale Undergraduate Journal of Comparative Literature*; Morse Residential College Council; Yale University Committee of Review; Yale A.C.M.E. Lab

EXPERIENCE

Skadden, Arps, Slate, Meagher & Flom LLP Palo Alto, CA.
Litigation Associate September 2022 – Present
Summer Associate June – August 2021

Litigate civil cases in state and federal court as well as alternative dispute resolution. Advise clients through internal investigations in response to inquiries by federal regulators. Pro bono practice has included representing victims of the Family Separation Policy in FTCA litigation and providing legal advice to non-profit corporations.

Stanford Law School Immigrants' Rights Clinic Stanford, CA.
Clinical Student March – June 2022

Researched and drafted opening brief for petition for review of final removal order at the Ninth Circuit Court of Appeals. Conducted an assessment of noncitizen detention center conditions at a new ICE facility.

United States Attorney's Office for the Northern District of California San Francisco, CA.
Law Clerk, Civil Division January – March 2022

Conducted research, wrote sections of motions for summary judgment and motions to dismiss, prepared for depositions, and drafted declarations.

San Francisco District Attorney's Office San Francisco, CA. (*Remote*)
Legal Intern & Fair and Just Prosecution Fellow June – August 2020

Researched questions of criminal procedure and California evidence law for the Chiefs of the SFDA Criminal Division. Drafted office-wide policy directive on the use of confidential informants and cooperating witnesses, with consideration for evidentiary concerns, substantive law, and policy priorities.

Innovations for Poverty Action New Haven, CT.
Programs Associate August 2017 – July 2019

Supported offices throughout Asia and Latin America to develop impact evaluations of government and NGO poverty alleviation programs. Coordinated grant proposals securing funding in excess of USD 1 million.

ADDITIONAL INFORMATION

Admissions: California (December 2022); Northern District of California (December 2022)
Interests: Peloton, effective altruism, pottery, Carmen Maria Machado's *In the Dream House*